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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 90.

SIMEON F. HALL, WILLIAM HALL, AND GEORGE W. STITT, PLAINTIFFS IN ERROR,

vs.

JOHN H. CORDELL AND WILLIAM F. DUNNICA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED SEPTEMBER 7, 1888.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, district judge of the United States for said northern district of Illinois, on Tuesday, the twenty-seventh day of December, in the December term of said court, in the year of our Lord one thousand eight hundred and eighty-seven, and of our Independence the one hundred and twelfth year.

WM. H. BRADLEY, *Clerk.*

JOHN H. CORDELL and WILLIAM F. DUNNICA
vs.
SIMEON F. HALL, WILLIAM HALL, and GEORGE W. STITT. } Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the second day of December, 1886, came the plaintiffs, by their attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, their præcipe for a writ of summons, and also at the same time filed their bond for
2 costs in said above-entitled cause; which said præcipe and bond are respectively in the words and figures following, to wit:

Præcipe.

United States Circuit Court, Northern District of Illinois.

JOHN H. CORDELL and WILLIAM F. DUNNICA, Copartners under the Firm Name of Cordell and Dunnica, Plaintiffs,
vs.
S. F. HALL, WILLIAM HALL, and GEORGE W. STITT, Copartners under the Firm Name of Hall Brothers and Co., Defendants.

The clerk of said court will issue a summons in the above-entitled cause, in a plea of trespass on the case on promises, to the damage of the plaintiff- in the sum of ten thousand dollars, and direct the same to the marshal to execute, and make it returnable to the December term of said court, A. D. 1886.

FLOWER, REMY & GREGORY,
Plaintiffs' Attorneys.

Chicago, Dec. 2nd, 1886.

Endorsed: Filed this 2nd day of Dec., A. D. 1886. Wm. H. Bradley, clerk.

3 *Bond for Costs.*

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

Circuit Court, December Term, A. D. 1886.

CORDELL *et al.*
vs.
HALL *et al.* } In Law.

We enter ourselves security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the plaintiffs of any costs ordered or adjudged to be paid by them we hereby agree and stipulate that execution may issue against our property for any costs taxed against them. Dated this second day of December, A. D. 1886.

FLOWER, REMY & GREGORY.

Endorsed: Filed Dec. 2, A. D. 1886. Wm. H. Bradley, clerk.

4 On the same day, to wit, on the second day of December, 1886, there issued out of said clerk's office a writ of summons in said entitled cause; which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

The United States of America to the marshal of the northern district of Illinois, Greeting:

We command you to summon S. F. Hall, William Hall, and George W. Stitt, copartners as Hall Bros. and Co., if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the third Monday of December instant, to answer unto John H. Cordell and William F. Dunnica, copartners as Cordell and Dunnica, of a plea of trespass on the case upon promises, to their damage, as is alleged, of ten thousand dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 2d day of December, in the year of our Lord [SEAL.]
5 one thousand eight hundred and eighty-six, and of our Independence the 111th year.

WM. H. BRADLEY, *Clerk.*

Marshal's Return.

I have served the within writ by reading the same to and within the presence and hearing of S. F. Hall, William Hall, and George W. Stitt, therein named, on the 9th day of December, 1886.

F. H. MARSH,
U. S. Marshal,
By GEO. N. JONES, *Deputy.*

Endorsed: Filed Dec. 9, A. D. 1886. Wm. H. Bradley, clerk.

6 Afterwards, to wit, on the fifteenth day of February, 1887, came the plaintiffs, by their attorneys, and filed in said clerk's office their declaration in said entitled cause; which said declaration is in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States, to the December Term, A. D. 1886.

John H. Cordell and William F. Dunnica, copartners doing business under the firm name and style of Cordell & Dunnica, and who are residents and citizens of the State of Missouri, plaintiffs, by Flower, Remy & Gregory, their attorneys, complain of S. F. Hall, William Hall, and George W. Stitt, copartners doing business under the firm name and style of Hall Bros. & Co., and who are residents and citizens of the State of Illinois and of the northern district thereof, defendants, summoned, etc., of a plea of trespass on the case on promises.

For that whereas the said plaintiffs, on or about the first day of January, 1886, were engaged in the business of banking, etc., and while engaged in such business said plaintiffs entered into an agreement and arrangement with said defendants wherein
7 and whereby it was agreed that said plaintiffs would, in the course of dealings between said defendants and one George Farlow, who then was and still is engaged in the business of buying, selling, and shipping cattle, cash all drafts or bills of exchange drawn by the said Farlow upon the said defendants on account of shipment of cattle then purchased by the said Farlow and consigned to the said defendants, and who, upon the receipt of said drafts or bills of exchange, would then and there honor the same on account of said shipments of cattle aforesaid; that in pursuance of said arrangement said plaintiffs from thence hitherto have, upon the presentation of said drafts or bills of exchange drawn by said Farlow upon said defendants and made payable to the order of said plaintiffs, cashed the same and paid the proceeds over to said Farlow and forwarded said drafts or bills of exchange to said defend-

ants, who then and there upon presentation thereof accepted and paid the same; that afterwards, to wit, on or about the thirteenth day of July, 1886, said Farlow presented and made out a certain draft or bill of exchange made payable to the order of said plaintiffs and directed to said defendants, in and by which draft or bill of exchange said defendants were requested and directed to pay the said plaintiffs or their order the sum of eleven thousand
8 two hundred and seventy-four dollars; which said draft or bill of exchange said plaintiffs then and there, as was their custom so to do, and in pursuance of said agreement as aforesaid, cashed and paid over the proceeds thereof to the said Farlow, and then and there caused said draft or bill of exchange to be forwarded to said defendants in the district aforesaid, to be paid by them upon the receipt thereof by said defendants; and plaintiffs aver that said draft or bill of exchange of the date and amount last aforesaid was duly received by said defendants, as well as, to wit, nine loads of cattle and one load of hogs, which were consigned by the said Farlow to the said defendants, to be sold by said defendants under the arrangement aforesaid; but that said defendants, contrary to the said agreement and promise as aforesaid, then and there, in the district aforesaid, refused to honor and pay the said draft or bill of exchange, and have ever since so refused and failed to pay as aforesaid, and that said draft or bill of exchange was then and there in said district duly protested for the non-payment thereof, by reason whereof the plaintiffs have been injured and suffered damages, etc.

And whereas also one George Farlow heretofore, to wit, on the thirteenth day of July, in the year of our Lord one thousand eight hundred and eighty-six, at Marshall, Missouri, made his
9 certain bill of exchange in writing, bearing date the day and year last aforesaid, and directed the same to the said defendant-, and thereby and therein then and there requested the said defendants to pay to the order of Cordell and Dunnica the sum of eleven thousand and two hundred and seventy-five dollars for value received, and then and there delivered the said bill of exchange to the said Cordell and Dunnica; which said bill of exchange the said defendants afterwards, to wit, on the fifteenth day of July, 1886, at Chicago, to wit, in the said district, upon sight thereof accepted.

By means whereof and by force of the statute in such case made and provided the said defendants became liable to pay said plaintiffs said sum of money mentioned in the said bill of exchange, and being so liable in consideration thereof then and there undertook and promised to pay the same to the said plaintiffs according to the tenor and effect of the said bill of exchange and acceptance thereof as aforesaid, to wit, at the place aforesaid.

And whereas also the said defendant- afterward, to wit, on the second day of December, in the year of our Lord one thousand eight hundred and eighty-six, to wit, at said district, became and are indebted unto the said plaintiffs in a large sum of money, to wit, ten thousand dollars, for money before that time lent
10 and advanced to said defendant- by said plaintiffs at said defendants' request; and also in the like sum for money be-

fore that time paid, laid out, and expended for said defendants by said plaintiffs at the like special request of said defendants; and in the like sum for money before that time had and received by said defendants to and for the use of said plaintiffs; and also in the like sum for goods, wares, and merchandise before that time sold and delivered by said plaintiffs to said defendants at the like special instance and request; and also in the like sum for the labor, care, and diligence of said plaintiffs before that time done and performed by said plaintiffs for said defendants and at the like instance and request of said defendants; and also in the like sum for other money before that time and then due and owing the said plaintiffs for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from the said defendants to the said plaintiffs; and also in the like sum then and there found to be due and owing from said defendants to said plaintiffs on an account stated between them, and, being so indebted, said defendants, in consideration thereof, then and there undertook and promised to pay said plaintiffs said several sums of money above mentioned when thereunto afterwards requested.

11 Nevertheless the said defendants, although often requested, etc., to wit, on the day when the said bill of exchange became due and payable according to the tenor and effect thereof, and oftentimes since, to wit, at the place last aforesaid, have not yet paid the said several sums of money above mentioned or any or either of them or any part thereof to the said plaintiffs, but to pay the same or any part thereof to the said plaintiffs the said defendants have hitherto wholly neglected and refused and still do neglect and refuse, to the damage of the said plaintiffs of ten thousand dollars; and therefore the said plaintiffs bring suit, etc.

FLOWER, REMY & GREGORY,
Plaintiffs' Attorneys.

Copy of Instrument and Account Sued On.

Cordell and Dunnica, bankers.

$11,274.00. MARSHALL, *July 13th*, 1886.

Pay to the order of Cordell & Dunnica eleven thousand two hundred and seventy-four dollars—9 loads cattle, 1 load of hogs.

GEORGE HARLOW.

To Hall Bros. & Co., Union stock yards, Chicago, Ill.

Endorsed: Filed this 15th day of Feb'y, 1887. Wm. H. Bradley, clerk.

12 Afterwards, to wit, on the fifteenth day of March, 1887, came the defendants, by their attorney, and filed in said clerk's office their plea in said entitled cause; which said plea is in the words and figures following, to wit:

Plea.

NORTHERN DISTRICT OF ILLINOIS:

In the Circuit Court of the United States for the Northern District of Illinois, of the December Term, A. D. 1886.

SIMEON F. HALL, WILLIAM HALL, and GEORGE W. STITT *ads.* JOHN H. CORDELL and WILLIAM F. DUNNICA.

And the said defendants, by Joseph A. Sleeper, their attorney, come and defend the wrong and injury, when, etc., and says that they did not undertake or promise in manner and form as the said plaintiff- hath above thereof complained against them; and of this they put themselves upon the country, etc.

JOSEPH A. SLEEPER,
Defendants' Attorney.

Endorsed: Filed this 15th day of March, A. D. 1887. Wm. H. Bradley, clerk.

13 Afterwards, to wit, on the twenty-third day of November, in the adjourned October term of said court, 1887, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

JOHN H. CORDELL *et al.* *vs.* S. F. HALL *et al.* } Assumpsit.

On motion of the plaintiffs, by their attorney, leave is given them to amend their declaration herein, and said defendants are hereby ruled to plead to said amendment by Monday next.

On the same day, to wit, on the twenty-third day of November, 1887, came the plaintiffs, by their attorneys, and filed in said clerk's office an additional count to the declaration in said entitled cause; which said count is in the words and figures following, to wit:

Additional Count.

Also for that said plaintiffs on or about the first day of January, 1886, were and ever since have been engaged in the business of banking, etc., at the city of Marshall, in the State of Mis-
14 souri, and said defendants were at said date and ever since have been engaged in the business of live-stock commission merchants at the Union stock yards, in the county of Cook, State of Illinois; that on or about the 31st day of March, 1886, an agreement was entered into between said defendants and one George Farlow, who at that time was and since has been engaged in the busi-

ness of shipping cattle to Chicago and other points from the State of Missouri, by which it was promised and agreed by said defendants that said Farlow should from time to time ship to said defendants live stock, to be sold by said defendants as commission merchants, and that said Farlow should at the time of such shipments draw drafts or bills of exchange on said defendants, payable to the order of said plaintiffs, to cover the price of live stock so shipped, and that said defendants would accept and pay or pay all drafts or bills of exchange so drawn; which said agreement was before and at the time of the transaction hereinafter complained of reported and communicated by said parties to said plaintiffs and by said plaintiffs believed and relied upon.

And plaintiffs aver that under and in pursuance of said agreement and on or about the 13th day of July, 1886, said Farlow shipped to said defendants certain live stock, to wit, nine car-loads of cattle and one car-load of hogs, and drew a draft or bill of
15 exchange on said defendants against said live stock for the sum of eleven thousand two hundred and seventy-four dollars, payable to the order of said plaintiffs; that said draft was presented by said Farlow to said plaintiffs for discount, according to said agreement, and said plaintiffs, relying upon said agreement above mentioned so communicated to them and believing that said draft would be accepted and paid by said defendants according to said agreement, discounted said draft and paid said Farlow full value therefor, and then and there caused said draft to be forwarded to said defendants for acceptance and payment.

And plaintiffs further aver that said draft was duly presented to said defendants for acceptance and payment, and that said live stock, to wit, said nine car-loads of cattle and one car-load of hogs, was duly received and sold by said defendants and the proceeds therefrom received by said defendants, yet said defendants, not regarding their said promises and contrary to their said agreement, then and there, in the district aforesaid, refused to accept said draft or bill of exchange and declined to pay the same, and have ever since and do now refuse to accept or pay the same; by reason whereof the plaintiffs have been injured and suffered damages, &c.

Endorsed: Filed Nov. 23, 1887. Wm. H. Bradley, clerk.

16 Afterwards, to wit, on the second day of December, in the adjourned October term of said court, 1887, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

JOHN H. CORDELL *et al.* } Assumpsit.
vs.
S. F. HALL *et al.* }

On motion of the plaintiffs, by their attorney, leave is given them to amend their declaration herein.

17 Afterwards, to wit, on the sixth day of December, 1887, came the defendants, by their attorney, and filed in said clerk's office their pleas in said entitled cause; which said pleas are in the words and figures following, to wit:

Pleas.

Circuit Court U. S., Northern District Illinois, October Term, 1887.

JOHN H. CORDELL and WILLIAM DUNNICA
vs.
S. F. HALL, WILLIAM HALL, & GEORGE W. STITT.

And now comes the said defendants, by J. A. Sleeper, their attorney, and defend the wrong and injury, when, etc., and say that they did not undertake or promise in manner and form as the said plaintiffs have above thereof complained against them; and of this they put themselves upon the country, &c.

And for a further plea in this behalf, by leave of the court first had and obtained, the said defendants, as to the first count in the original declaration of the said plaintiffs and as to the additional count filed herein at this present term of court, to wit, on November 23, 1887, say that by reason of anything in those counts contained the said plaintiffs ought not to have or maintain their

18 aforesaid action thereof against them in respect of those counts, because they say that the promises and undertakings of the defendants therein stated and alleged, to accept or pay the drafts of the said George Farlow made on them, if any such were made, were not made in writing; that they were made in the State of Missouri and not elsewhere, and that in and by the statutes of the said State of Missouri, to wit, chapter ten of the Revised Statutes of the State of Missouri, entitled "Of bills of exchange and negotiable promissory notes," the same being a public statute of such State, acceptances of bills of exchange are required to be in writing in order that any person shall be charged as acceptor thereof, and all promises to accept bills of exchange made before the same are drawn are also required to be in writing and to be unconditional in order to be binding on the person making the same.

And this the said defendants are ready to verify; wherefore the said defendants pray judgment of the said plaintiffs by reason of anything contained in those counts ought to have or maintain their aforesaid action against them, the said defendants, &c.

J. A. SLEEPER,
Def'ts' Att'y.

Endorsed: Filed Dec. 6, 1887. Wm. H. Bradley, clerk.

19 Afterwards, to wit, on the seventh day of December, 1887, came the plaintiffs, by their attorneys, and filed in said clerk's office their replication to the plea of the defendants in said entitled cause; which said replication is in the words and figures following, to wit:

Replication.

In the Circuit Court of the United States, Northern District of Illinois.

JOHN H. CORDELL & WILLIAM DUNNICA, Plaintiffs,
vs.
S. F. HALL, WILLIAM HALL, and GEORGE W. STITT, Defendants.

Now come said plaintiffs, by their attorneys, Flower, Remy & Holstein and Boyd & Sebree, and as to the first plea of said defendants, whereof they have put themselves upon the country, do the like.

And the plaintiffs, as to the plea of said defendants by them secondly above pleaded, say that the plaintiffs, by reason of anything in that plea alleged, ought not to be barred from having their aforesaid action, because they say that the promise of the defendants in the declaration mentioned was an original promise of and undertaking by defendants to plaintiffs to pay drafts or bills of exchange drawn on defendants by said George Farlow in favor of
20 plaintiffs and discounted by them, which said promise was to be performed by defendants in the State of Illinois, where defendants resided and where this suit was instituted and is now pending, and plaintiffs pray may be inquired of by the country.

And, for a further replication, by leave of the court, to said second plea of defendants, the plaintiffs say that they ought not to be barred from maintaining their action by reason of anything in that plea alleged, because they say that the said draft was drawn by said George Farlow and discounted by plaintiffs upon the faith of said promise of defendants that they would pay the same; and the money thereon paid by plaintiffs to said Farlow, the amount thereof being the face of said draft, was used by said Farlow in purchasing nine car-loads of cattle and one car-load of hogs; all of which facts the defendants well knew at the time they received said live stock, as hereafter stated.

That said cattle and hogs were at the time said draft was forwarded for payment consigned to defendants for sale by them and were received by defendants and sold by them and they received the proceeds thereof, amounting to about eleven thousand dollars, and thereby the defendants became bound to pay said draft; and this plaintiffs pray may be inquired of by the country.

21 FLOWER, REMY & HOLSTEIN AND
BOYD & SEBREE, *Attorneys for Plaintiffs.*

Endorsed: Filed Dec. 7, 1887. Wm. H. Bradley, clerk.

On the same day, to wit, on the seventh day of December, 1887, came the defendants, by their attorney, and filed in said clerk's office their demurrer to the replication in said entitled cause; which said demurrer is in the words and figures following, to wit:

Demurrer.

Circuit Court U. S., Northern District Illinois.

JOHN H. CORDELL *et al.*
vs.
S. F. HALL *et al.*

And the said defendants, as to the said replication of the said plaintiffs by them firstly replied to the plea of the said defendants, *and* the matters and things therein contained in manner and form as the same are therein set forth are not sufficient in the law for the said plaintiffs to have or maintain their aforesaid action in respect of the said counts of the said plaintiffs' declaration
22 mentioned and referred to in said plea against the said defendants, and that the said defendants are not bound by the law of the land to answer the same; and this they are ready to verify, and they show the following causes of demurrer:

1. The said replication does not state facts sufficient to answer the said plea.

2. The replication is a departure from the matters contained in the said first count mentioned in said plea.

3. The said replication is a departure from the matters contained in the count filed at this same term of October and mentioned in said plea. Wherefore, for want of a sufficient replication in that behalf, the said defendants pray judgment if the plaintiffs ought to have or maintain their aforesaid action thereof against the said defendants in respect of those counts, &c.

And as to the said replication of the said plaintiffs by them secondly above replied to the said plea of the said defendants and the matters and things therein contained in manner and form as the same are therein set forth the said defendants say that they are not sufficient in the law for the said plaintiffs to have or maintain their aforesaid action in respect of the said counts of the said plaintiffs' declaration mentioned and referred to in said plea against said defendants, and that the said defendants are not bound by the
23 law of the land to answer the same; and this they are ready to verify, and they show the following causes of demurrer:

1. The said replication does not state facts sufficient to answer the said plea.

2. The replication is a departure from the matters contained in the said first count mentioned in said plea.

3. The said replication is a departure from the matters contained in the count filed at this same term of October and mentioned in said plea. Wherefore, for want of a sufficient replication in that behalf, the said defendants pray judgment if the plaintiffs ought to have or maintain their aforesaid action thereof against the said defendants in respect of those counts, &c.

J. A. SLEEPER,
Defendants' Attorney.

Endorsed: Filed Dec. 7, 1887. Wm. H. Bradley, clerk.

24 Afterwards, to wit, on the eighth day of December, 1887, came William Hall and filed in said clerk's office his affidavit in said entitled cause; which said affidavit is in the words and figures following, to wit:

Affidavit.

Circuit Court U. S., Northern Dist. of Illinois.

JOHN H. CORDELL and WILLIAM DUNNICA }
vs.
SIMEON F. HALL *et al.* }

UNITED STATES OF AMERICA, }
Northern Dist. of Illinois. }

William Hall, being duly sworn, says that he is one of the defendants in the above-entitled suit; that the defendants have, as he verily believes, a good and substantial defence on the merits of the whole of the plaintiffs' cause of action in this case.

That one D. A. Hancock, who resides at Blackburn, Mo., is a necessary and material witness for the defendants, and that without his testimony defendants cannot safely proceed to the trial of this case.

That he believes that said defendants can prove by said Hancock that he sold to George Farlow 126 of the cattle, for and on
25 account of which the draft on which this suit is brought was drawn, and delivered them to George Farlow, at said Blackburn, Mo., on the twelfth day of July, 1886, the day on which they were shipped to said defendants or the day before; that the actual cost of said cattle to said Farlow at said Blackburn was ten thousand two hundred and seventy-two dollars and fifty cents.

And also that the cattle and hogs in that shipment did not cost said Farlow the sum of eleven thousand two hundred and seventy-four dollars, but much less.

That the defendants did not know that said Hancock was such material witness, nor that they could prove said facts by him until this morning; that on Saturday last George Farlow was examined and gave his deposition as a witness in this case, and then stated that he bought part of said cattle from said Hancock, and also said that the whole amount of money mentioned in said draft was paid out for the cattle and hogs contained in the shipment against which said draft was drawn.

This deponent thereupon wrote to said Hancock in relation to the matter, directing him answer by telegram, and he has this morning received an answer to said letter, and by that he learns that he can prove the facts above stated in relation to the sale of said cattle by Hancock to said Farlow and the cost thereof, and also that be-

fore the time said cattle were so delivered to said Farlow by
26 said Hancock Farlow had paid to him on account of the purchase price of them five hundred dollars.

WM. HALL.

Subscribed and sworn to before me this 8th day of December, 1887.

E. A. DRUMMOND, *U. S. Com.*

Endorsed: Filed Dec. 8, 1887. Wm. H. Bradley, clerk.

27 On the same day, to wit, on the eighth day of December, in the adjourned October term of said court, 1887, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JOHN H. CORDELL and WILLIAM F. DUNNICA
vs.
S. F. HALL, WILLIAM HALL, and GEORGE W. STITT. } Assumpsit.

Now come the parties, by their attorneys, and now comes on to be heard the demurrer of the defendants to the replication to the third plea filed herein, and after hearing the arguments of the counsel the court overrules said demurrer; to which ruling the defendants, by their attorneys, now except, and the defendants, by their attorney, now move the court upon affidavit filed to continue this cause on account of the absence of a material witness, and upon the plaintiffs, by their attorney, admitting that said witness would swear to the facts as stated in said affidavit the court overrules said motion; and upon issues joined herein thereupon comes a jury of good and lawful men, to wit, Christian Andres, Henry W. Mackney, J. D. Moore, Joel C. Grist, M. C. Marian, Fred. Wheelock, D. E. Lee, R. D.
28 Palen, J. S. Bartlett, John Comisky, Andrew F. Bradley, and Joseph Pollak, who were all duly elected, tried, and sworn well and truly to try said issues, and after hearing the direct evidence on the part of the plaintiffs the defendants, by their attorneys, move the court to instruct the jury to return a verdict for the defendants, and after hearing the arguments of the counsel upon said last-named motion the court overrules the same; to which ruling of the court on said last-named motion the defendants, by their attorneys, now except; and the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until tomorrow morning.

Afterwards, to wit, on the ninth day of December, in the adjourned October term of said court, 1887, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JOHN H. CORDELL *et al.*
vs.
S. F. HALL, WILLIAM HALL, *et al.* } Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after
29 hearing the concluding evidence on the part of the defendants and plaintiffs and the arguments of the counsel and receiving the instructions of the court the jury retired to consider of their verdict, and by agreement of the parties, by their attorneys, the jury when they shall have agreed upon a verdict may sign and seal the same and deliver it to the officer in charge and disperse.

Afterwards, to wit, on the tenth day of December, in the adjourned October term of said court, 1887, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JOHN H. CORDELL *et al.*
vs.
S. F. HALL, WILLIAM HALL, *et al.* } Assumpsit.

The jury in this behalf empaneled and sworn this day returned into court their sealed verdict, wherein they say: We, the jury, find the issue for the plaintiffs and assess their damages at five thousand seven hundred and eighty-five dollars and seventy-nine cents.

And thereupon the defendants, by their attorney, move the court for a new trial herein.

30 Afterwards, to wit, on the twenty-seventh day of December, in the December term of said court, 1887, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Judgment.

JOHN H. CORDELL and WILLIAM F. DUNNICA
vs.
SIMEON F. HALL, WILLIAM HALL, and GEORGE W. STITT. } Assumpsit.

Now come the parties, by their respective attorneys, and now comes on to be heard the motion of the defendants for a new trial, and after hearing the arguments of the counsel the court overrules said motion and awards judgment upon the verdict.

It is thereupon considered and adjudged by the court that said plaintiffs do have and recover of said defendants the said sum of five thousand seven hundred and eighty-five dollars and seventy-nine cents, their damages so as aforesaid assessed, together with their costs

and charges in this behalf expended, amounting to — dollars and — cents, and that they have execution therefor.

And on motion of the defendants, by their attorneys, the
31 time is extended thirty days for them to file a bill of exceptions herein, and the amount of the supersedeas bond herein is fixed at eight thousand dollars.

32 On the hearing of said cause the following exceptions were taken and were allowed by the court and made of record; which said exceptions are in the words and figures following, to wit:

Bill of Exceptions.

Circuit Court of the United States, Northern District of Illinois.

JOHN H. CORDELL and WILLIAM F. DUNNICA
vs.
SIMEON F. HALL, WILLIAM HALL, and GEORGE W. STITT.

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

Be it remembered that on the eighth day of December, as yet of the term of October, A. D. 1887, this case came on to be tried in this court before the Honorable Henry W. Blodgett, judge of the district court of the United States for the northern district of Illinois, at which time — the said plaintiffs, by their attorneys, and the said defendants, by their attorneys, and also a jury *of the* duly empaneled, chosen, tried, and sworn to try the issues joined herein.

And thereupon the counsel for the said plaintiffs, to maintain the issues on their part, offered and read in evidence a certain
33 draft or bill of exchange in the words and figures following—that is to say:

$11,274.00. MARSHALL, *July* 13, 1886.

Pay to the order of Cordell & Dunnica eleven thousand two hundred and seventy-four dollars—9 car-loads of cattle and one load of hogs.

GEORGE FARLOW.

To Hall Bros. & Co., Union stock yards, Chicago, Ill.

And also a certain protest thereof in writing, made by a notary public, under his seal, for non-payment, on July 15, 1886. It was then admitted that the draft was presented to the defendants on that day and payment demanded and refused.

And thereupon the counsel for the said plaintiffs called and had sworn as witnesses on their behalf George Farlow, William E. Farlow, John H. Cordell, and others, who testified and gave evidence to the court and jury tending to prove that George Farlow was, on the first day of April, A. D. 1886, engaged in the business of buying, at Marshall and elsewhere, in the State of Missouri, live stock

and shipping the same to Chicago, to be sold on the market at the Union stock yards, near Chicago, and had been so engaged for many years; that the defendants were live-stock commission men at said Union stock yards, doing and carrying on the busi-
34 ness of receiving live stock consigned to them at the said stock yards and selling the same for the owners and consignors for a commission paid to them.

That the said plaintiffs were and for many years had been bankers at Marshall, in the State of Missouri; that George Farlow had, during the month of March, A. D. 1886, purchased live stock in Missouri and shipped and consigned it to the defendants at the Union stock yards aforesaid for sale by them as commission men for a commission, and he had made several such shipments; that for many years Farlow had done business with the plaintiffs, as his bankers, at Marshall; that when he made the shipments in March he drew drafts for the cost of the live stock on the defendants, Hall Brothers & Co., at the Union stock yards, Chicago, payable to Cordell and Dunnica; they took the drafts and paid the money for which the drafts were drawn, on checks drawn on them by Farlow in favor of the persons from whom he had purchased the live stock; that Hall Bros. & Co. had received the stock, sold it on the market for account of Farlow, and had paid all the drafts drawn on them by Farlow in favor of Cordell and Dunnica; that about the first day of April, A. D. 1886, William Hall, one of the defendants, was at Marshall, in the State of Missouri. The counsel for the plaintiffs then offered to prove by witnesses that in a conversation
35 between Mr. Cordell, one of the defendants, and said William Hall, he, Hall, for his firm, had verbally agreed that they would pay all the drafts drawn by George Farlow in favor of the plaintiffs on Hall Bros. & Co. for the cost of live stock which Farlow should buy and ship to the Union stock yards and consign to them, Hall Bros. & Co. The counsel for the defendants objects to such evidence being given on the ground that it was incompetent, because by the statutes of the State of Missouri in force at that time, to wit, chapter ten of the Revised Statutes of the State of Missouri, entitled "Of bills of exchange and promissory notes," acceptances of bills of exchange are required to be in writing in order that any person shall be charged as acceptor thereof, and all promises to accept or pay any bill of exchange made before the same are drawn are also required to be in writing and to be unconditional in order to be binding on the person making the same, and the said counsel then and there produced and read to the said court the said statute; whereupon the said court overruled the said objection and allowed the said evidence to be given by the said witnesses; to which ruling and decision of the said court the said defendants, by their counsel, did then and there, in due form of law, object.

36 And thereupon the said plaintiffs, by their counsel, did give evidence, by the testimony of witnesses, tending to prove that said William Hall did, at Marshall, in the State of Missouri, on or about April 1, 1886, make a verbal agreement with the plaintiffs that his firm of Hall Bros. & Co. would pay all drafts

drawn by George Farlow in favor of plaintiffs on Hall Bros. & Co. for the cost of live stock bought by him, Farlow, and shipped and consigned to Hall Bros. & Co. at the Union stock yards, Chicago, Illinois.

That Farlow had no unincumbered property, and that the plaintiffs were not willing to advance money on Farlow's drafts unless the defendants would agree to protect the same.

The counsel for the plaintiffs offered further evidence tending to show that between April 1, 1886, and July 13, 1886, said George Farlow bought in Missouri a large number of cattle, hogs, and live stock and shipped them to the Union stock yards, Chicago, Illinois, consigned to Hall Bros. & Co., amounting to as many as thirty-five or forty shipments, which live stock Hall Bros. & Co. received and sold as commission men for Farlow; that in the case of each shipment Farlow, after the live stock was weighed and on board the cars, drew his drafts for the cost of the live stock so
37 shipped on Hall Bros. & Co. at the Union stock yards, Chicago, Illinois, payable to Cordell & Dunnica or order; that Cordell and Dunnica received the draft, paid out the money mentioned in it on George Farlow's checks drawn in favor of parties from whom he had purchased the stock, and for the expenses, small in amounts, of shipping the stock, which the witnesses said constituted a part of the cost of the stock; that they sent the drafts to Chicago for collection, and in every instance Hall Bros. & Co. had paid the drafts on presentation or soon thereafter, so that no draft had been dishonored; that on or about July 13, 1886, George Farlow shipped at Blackburn, Missouri, a station about twelve miles from Marshall, to the Union stock yards, Chicago, Illinois, nine car-loads of cattle and one car-load of hogs, consigned to Hall Bros. & Co., which were received by Hall Bros. & Co. and sold by them for account of George Farlow, and proceeds received by them; that the draft read in evidence was drawn by George Farlow, discounted by Cordell & Dunnica, and the amount of the draft credited to Farlow on their books, and by them paid out on Farlow's checks given to parties from whom he had bought the nine car-loads of cattle and one car-load of hogs, and for the expenses incurred in shipping the cattle, &c.; that said draft covered the cost only to Farlow of said live stock; that Cordell and Dunnica sent the
38 draft forward for collection; it was presented to Hall Bros. & Co. for payment; that they refused to pay it and it was protested for non-payment; that after the draft had been protested there was received by the plaintiffs from the proceeds of these cattle and hogs $5,936.55, that being the amount of the net proceeds of the cattle and hogs received by Hall Bros. & Co. after taking from the gross proceeds the freight on the shipment, the expenses of feeding the stock on the way and at the stock yards, the stock-yards charges, charges of the persons coming with the stock, and the commissions on the sale and the amount owing by Farlow to Hall Bros. & Co. for moneys paid by them on his drafts over and above the net proceeds of live stock received from him by them and sold for him on the market, and two thousand dollars, the amount due them on

promissory notes given by George Farlow to defendants for money loaned to him by them, which notes were then passed due.

The counsel for the defendants gave evidence tending to show that William Hall did not make the verbal agreement with Cordell and Dunnica, as testified to by witnesses on the part of the plaintiffs; that said William Hall had no conversation with Cordell and Dunnica or either of them on the subject — the purchase of cattle or live stock by Farlow or the shipment or consignment of it to
39 Hall Bros. & Co., at Union stock yards, for sale or the payment of drafts drawn by Farlow on them. The counsel for the defendants gave evidence tending to show that the occasion of William Hall going to and being in Marshall, Missouri, was that George Farlow had appealed to Hall Bros. & Co. to borrow $2,000.00 on his note and the note of one —— ——; that Cordell and Dunnica had sent the note to Hall Bros. & Co., and had recommended the parties as good and the note good security for the loan. On receiving the note and letter from Cordell and Dunnica, William Hall went to Missouri to make personal inquiry about the parties; that he did see Cordell and talk with him about making that loan and nothing else, and refused to make the loan; that after the conversation with Cordell he, Hall, saw George Farlow, and told him he would not make the loan then; that George Farlow then told him he had some ninety-two head of cattle on which he had made some payments which he offered to ship and consign to Hall Bros. & Co. for sale, against which he also wished to draw; that William Hall agreed with him that if he would ship those cattle and draw against them for the cost, less what he had already paid on them, and if the cattle came in time to meet the draft and they were as represented by him, Farlow, Hall Bros. & Co. would sell the cattle and
40 pay the draft, and that that was the only agreement made there at Marshall as to shipment of live stock by Farlow to Hall Bros. & Co.; that those cattle were afterwards shipped, not in name of George Farlow, but in the name of his brother, William E. Farlow, but the draft against them was drawn by George Farlow and in favor of Cordell and Dunnica; that the cattle netted some three hundred and more dollars than the amount of the draft; the proceeds of the cattle were credited to George Farlow on the books of Hall Bros. & Co.; the draft was paid and the amount charged to George Farlow in his account; that the course of business at the stock yards was and is that the live stock is received there subject to freight, expenses of feeding it on the way, of the persons who accompany it, and for feeding at the yards and charges of the stock yard company; all which the consignee pays, and with his commissions charges the shipper or consignor and deducts from the gross amount of sales, and the balance is the net proceeds of the sales.

That the course of doing the business between Hall Bros. & Co. and George Farlow was to credit him with the gross proceeds of each shipment and charge him with the money paid on account of it for freight and other expenses and with the commissions for

making sale, and when the money was paid on his drafts to
41 charge him with that money also; that when William Hall was at Marshall, April 1, 1886, George Farlow was indebted to Hall Bros. & Co. in the sum of ——.

That between April 1 and July 13, 1886, the proceeds of live stock shipped by Farlow and consigned to Hall Bros. & Co. were not sufficient to pay the moneys paid out by them for Farlow, so that on the 13th of July Farlow was indebted to Hall Bros. & Co. in the sum of $4,165.72, which included the two thousand dollars loaned by them to George Farlow as aforesaid.

That on the 15th day of July, 1886, Hall Bros. & Co. received the nine car-loads of cattle and one car-load of hogs, shipped by Farlow from Blackburn, Missouri; that there were 145 cattle and 63 hogs; that they sold them on the market at the stock yards for account of George Farlow, and the gross proceeds were $10,758 46

That Hall Bros. & Co. paid on account of that shipment as follows:

Freight, including feed on road	$525 00	
Yardage	41 29	
Hay	6 75	
Corn	2 00	
Inspection	15	
Cash advanced shipper	2 50	
Their commissions on sale	78 50	
		656 19
Net proceeds		$10,102 27
That Hall Bros. & Co. on that day deducted from this net proceeds Farlow's debt on their books		4,165 72
Leaving a balance due him of		$5,936 55

42 This balance they deposited in the Drovers' National bank, at the stock yards, Chicago, for account of Cordell and Dunnica, Marshall, Missouri, for the use of George Farlow, July 16, 1886. The Drovers' National bank deposited the same amount on the same day with the Metropolitan National bank, the correspondent of Cordell and Dunnica, to the credit of Cordell and Dunnica, Marshall, Missouri, for use of George Farlow, and from the Metropolitan bank the plaintiffs received this balance of $5,936.55.

The testimony being closed, the said defendants, by their counsel, prayed the said court to charge the jury—

1. That the oral agreement, to which the plaintiffs and their witnesses have testified, under the statute of Missouri was not valid and binding on the defendants, if it was made in Missouri, because it was not in writing; which instruction the court refused to give, and to such refusal the said defendants, by their counsel, did then and there in due form of law *did* except.

2. That the entire evidence in this cause is hereby excluded by

the court and you should bring in a verdict for the defendants; which the said court refused to give, and to such refusal the defendant-, by their counsel, did then and there except in due form of law.

The said defendants also requested the court to instruct the jury as follows, to wit:

43 3. That the burden of proof is upon the plaintiffs, and it is for them to prove their case by a preponderance of the evidence. If the jury find that the evidence bearing upon the plaintiffs' case is evenly balanced or that it preponderates in favor of the defendants, then the plaintiffs cannot recover and the jury should find for the defendants.

4. That the testimony of one credible witness is entitled to more weight than the testimony of many others, if, as to those other witnesses, the jury have reason to believe and do believe from the evidence and all the facts before them that such other witnesses have knowingly testified untruthfully and are not corroborated by other credible witnesses or by circumstances proved in the case.

5. That the preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts.

In determining upon which side the preponderance of the evidence is the jury should take into consideration the opportunities of the several witnesses for seeing or knowing the thing about which they testify, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the suit, the probability or improbability of the truth of their several statements, in view of all the other evidence, facts, and circumstances proved

44 on the trial, and from all these circumstances determine which side the weight of preponderance of the evidence lies.

6. That if they believe from the evidence that the plaintiff Cordell has sworn positively that the defendant William Hall, at Marshall, Missouri, on March 31st or April 1st, 1886, promised the said Cordell that the firm of Hall Bros. would accept all drafts drawn by one George Farlow on the said Hall Bros. for live stock shipped by said George Farlow to the said Hall Bros. & Co. to be sold on commission, and that the defendant William Hall has sworn just as positively that he did not make any such promise, but, on the contrary, that the only conversation that he ever had with the said Cordell related solely to the said Hall Bros. & Co. loaning the said George Farlow the sum of two thousand dollars—

And if the jury find from the consideration of all the evidence in the case that the testimony of the defendant William Hall is entitled to as much credit as that of the plaintiff Cordell and corroborated to the same extent, then, so far as that point is concerned, the jury should find for the defendant.

7. That before there can be a contract between two parties the minds of the two parties must come together and agree upon all the terms and conditions of the contract, or, as is sometimes said, the minds of the contracting parties must meet. If you believe

from the evidence that the minds of William Hall and the
45 plaintiff Cordell never met at Marshall, Missouri, then there never was a contract, and your verdict should be for the defendant-.

8. That if they believe from the testimony of Mr. Cordell and other witnesses that at the time of the making of the draft in question George Farlow had a good credit at the bank of the plaintiffs, and that said drafts, as well as prior drafts between March 31st and the date of said draft, was honored and paid by the plaintiffs upon the strength of that credit and the representations of Farlow, then you will find for the defendant-.

But the said court did not nor would give any of the said third, fourth, fifth, sixth, seventh, and eighth instructions above further than the charge which the said court did give to the said jury contains the substance of them or any of them, and to such refusal to charge the jury as requested in each of said requests the defendants, by their counsel, did then and there except in due form of law.

Charge to the Jury as Given by the Court.

1. GENTLEMEN OF THE JURY: This suit is brought upon an alleged agreement by the defendant- to pay a draft of $11,274, drawn July 13th, 1886, by one George Farlow, payable to the plaintiffs. The plaintiffs at the time of the transaction in question were bankers at Marshall, in the State of Missouri. The defendants were
46 live-stock brokers at the stock yards in the city of Chicago. The plaintiffs' position is substantially this, and they have offered proof in support of that: that on or about the last of March or the first of April, 1886, the defendants, by William Hall, one of the copartners, agreed with the plaintiffs that if they, the plaintiffs, would cash the drafts drawn by George Farlow on them against shipments made by Farlow to the defendants they would pay such drafts.

2. The first controversy you meet at the threshold of this case is as to whether such a promise was made. The plaintiffs have called in support of their position one of the members of the firm as a witness, Mr. Cordell, who testifies in substance that this promise was made to him at his bank, in the town of Marshall, in an interview between himself and Mr. Hall. William Farlow is also called as a witness by the plaintiffs, who testified that he was present at this conversation and heard it or a great part of it at least; that he heard the defendant Hall say, "Go on and cash the drafts and we will pay them until further notice."

3. The testimony of Mr. Cordell is to the same effect—that the defendant Hall said to him, "We will pay the drafts drawn for the cost of the cattle bought by Farlow and shipped to us until further notice." There is a letter written by the defendants, not to
47 the plaintiffs, but allowed to be put in evidence, in which they refer to the course of business; and there is the testimony of George Farlow upon the same tending to sustain the same

proposition on the part of the plaintiffs. The plaintiffs insist that something is to be inferred from the course of business which immediately follows this alleged contract between themselves and the defendants, as the defendants went on and cashed the drafts as they were drawn, although in many cases, as the proof shows, the proceeds of the cattle were not sufficient to pay the drafts. Yet the defendants paid them without finding any fault or in any way taking any exceptions to their obligations to pay them.

4. This business run on in this way from the time the contract was made—the last of March or the first of April—until the draft in question was drawn, on the 13th of July, 1886.

5. On the part of the defendants Mr. William Hall is called as a witness, and he testifies that he made no such contracts as Mr. Cordell and Mr. William Farlow testifies to; that he did not agree for his firm that they would pay the drafts drawn by Farlow for the cost of the cattle which he might buy to ship and consign to them:

48 so that you have a conflict of testimony here, and it becomes your duty in this case, so far as you are able, to reconcile this testimony if you can; if not, to say where the preponderance of the proof lies.

6. You are the judges under the law of the credibility of these witnesses, and not only of the credibility of the witnesses, but to say which of them you will believe.

7. It is for you to say, in the light of the testimony here, whether the defendants did agree, as is charged in this case, that they would pay these Farlow drafts that should be drawn and you will say where the preponderance of the proof lies. You are the judges. You have heard the witnesses testify. You have seen them here in court, and you are to say where the preponderance of the proof is. If you find from the proof that Mr. William Hall, one of the firm, agreed with the plaintiffs to pay these Farlow drafts drawn against the live stock shipped by him to the defendants, that the draft in question was so drawn, and that the defendants have refused to pay said draft, then the defendants are liable for the amount unpaid on this draft.

To the charge and instruction contained in this seventh paragraph the said defendants, by their counsel, then and there excepted in due form of law.

8. You will remember that the proof shows without dispute that there was the sum of $5,936.55 paid about three days after

49 these cattle were sold to the credit of the plaintiffs in one of the banks in this city. So they have received on account of this draft that amount, which leaves a balance due of $5,337.15 at the time the draft was drawn or at the time this payment was made, with interest from 15th of July, 1886, at the time the draft was protested for non-payment, if you find this contract was made.

9. You cannot find for the plaintiffs upon this aspect of the plaintiffs' case unless you find from the proof that the defendants did agree to pay these drafts as they should be drawn upon the defendants by Farlow and cashed by the plaintiffs. If you do find that this agreement was made, then the defendants are liable in this

case for the unpaid portion of this draft, which is $5,337.45 and interest on the amount from the 15th of July, 1886, to the present time.

To which charge and instruction as contained in this 9th paragraph the said defendants, by their counsel, did then and there except in due form of law.

10. If you find the testimony does not establish this agreement to pay these drafts by the defendants, then the defendants are not liable to pay the amount of the draft; but in that event, if you do so find, there is still another aspect of this case to be considered in the light of the evidence.

50 11. If you are satisfied from the proof that the nine car-loads of cattle and the one car-load of hogs mentioned in this draft, for you will observe the draft itself upon its face shows nine car-loads of cattle and one car-load of hogs, and you are to construe in the light of all the testimony that it was drawn against the nine car-loads of cattle and one car-load of hogs shipped, out of which proceeds the draft is to be paid—if you are satisfied from the proof that the nine car-loads of cattle and one car-load of hogs mentioned in this draft as shipped by George Farlow and bought by him was purchased by Farlow with money obtained from the plaintiffs, with the agreement that the plaintiffs were to be paid for their advance on such cattle out of the proceeds of such cattle when sold by the defendants as Farlow's brokers, and that the defendants knew about that—that is, that the defendants knew in the course of business between the plaintiffs and George Farlow and themselves and from other sources that Farlow had obtained the money to pay for said cattle from plaintiffs and had appropriated the proceeds of said shipments to the payment of said drafts—then the defendants, as Farlow's brokers, had no right to apply any part of the proceeds of said cattle to the payment of the debt of Farlow to themselves until the draft was fully paid.

To which charge and instruction of the said court as con-
51 tained in this 11th paragraph the said defendants, by their counsel, did then and there except in due form of law.

12. You will remember the proof shows these cattle brought net cash $10,102.27, out of which the defendants paid to themselves—that is, they kept for the purpose of canceling their claim against Farlow—the sum of $4,165.72, and deposited the balance, $5,936.55, to the credit of the plaintiffs with their correspondent here for the use of George Farlow.

13. Now, if you are satisfied that the defendants knew that Farlow had obtained advances from the plaintiffs upon these cattle, and that he had appropriated the proceeds of these cattle to the payment of those advances by this draft, then the defendants had no right to appropriate those proceeds to the payment of their own debt against Farlow; so that, in this aspect of the case, if you find from the proof that Farlow had appropriated, with the knowledge of the defendants, to the payment of this draft the proceeds of these cattle, then the defendants are liable for this $4,165.72 which they applied to the payment of their own debt against Farlow.

To which charge and instruction of the said court as contained in this 13th paragraph the said defendants, by their counsel, did then and there except in due form of law.

14. You are to infer, or rather you are to say, whether from the evidence in this case as to the course of business and dealings between the defendants and Farlow and between the plaintiffs and the defendants themselves the defendants knew of the dealings between Farlow and the bank, whether they did or not know Farlow had been advanced money from the plaintiffs upon these cattle.

52

To which charge and instruction as contained in this 14th paragraph the defendants, by their counsel, did then and there except in due form of law.

15. In considering this aspect of the case you are to say whether the evidence shows that Mr. William Hall, at the time he visited Marshall, Missouri, in the spring, found Farlow to be a man of means and enabled to make purchases of such a shipment of cattle as this was or whether some one had made the advances by which these cattle were purchased, and found that somebody's money besides Farlow's was invested.

To which charge and instruction as contained in this 15th paragraph the defendants, by their counsel did then and there except in due form of law.

16. When this draft came you are to say whether that itself was not notice to them that this was plaintiffs' money that had purchased these cattle, because that refers to the cattle in the draft itself.

To which charge and instruction as contained in this 16th paragraph the defendants, by their counsel, did then and there except in due form of law.

53

17. You will remember that the testimony is, and perhaps it may be said to be undisputed, that the defendants knew that Farlow was not a man of means enough necessary to carry on such a stroke of business as he had been carrying on and making such purchases as this shipment indicated.

To which charge and instruction as contained in this 17th paragraph the defendants, by their counsel, did then and there except in due form of law.

18. To recapitulate, if you find the contract which is set out in this declaration, that the defendants agreed to pay these drafts, is proven, then the defendants are liable for the full amount unpaid in the draft, with interest at six per cent.

To which charge and instruction as contained in this 18th paragraph the defendants, by their counsel, did then and there except in due form of law.

19. If you find that this branch of the case is not made out, but do find that the defendants knew that the plaintiffs had advanced their money on these cattle, and that Farlow had appropriated the proceeds of them to the repayment of those advances, then you will find the defendants liable for the amount of money which they then

appropriated, $4,165.72, and interest on that from the time
54 they appropriated it, which would be the time they received it, the 15th of July.

To which charge and instruction as contained in this 19th paragraph the defendants, by their counsel, did then and there except in due form of law.

20. For your convenience I have just noted with pencil on the draft and protest, which you will take with you, the amount of the draft and amount of payment, $5,936.55, and struck balance $5,337.45, and have also noted the undisputed fact as to the value of the proceeds of the cattle and the amount which was paid to the plaintiffs out of the proceeds, leaving a balance of $4,165.72, which, in the latter aspect of the case, would be the sum upon which you would compute the interest.

And thereupon the said jury retired under the charge of an officer sworn for that purpose, and afterwards returned into court with their verdict, whereby they found the issues for the said plaintiffs and assessed their damages by occasion of the premises at the sum of five thousand seven hundred and eighty-five dollars and seventy-nine cents.

And thereupon, after the said verdict and before judgment thereon, the said defendants, by their counsel, moved the said court to set aside the said verdict and to grant to them a new trial in the
55 said cause; which said motion the said court overruled and ordered judgment to be entered upon the verdict.

To which overruling of said motion and order for judgment the said defendants, by their counsel, did then and there, in due form of law, except.

And because none of the aforesaid exceptions appear upon the record of the said recovery the judge of the said court who presided at the trial of this cause has to this bill of exceptions set his hand and seal and ordered that the same be made a part of the record of said recovery.

H. W. BLODGETT, *Judge.*

Endorsed: Filed Dec. 27, 1887. Wm. H. Bradley, clerk.

56 Afterwards, to wit, on the twenty-eighth day of January, 1888, there was filed in said clerk's office a bond in said entitled cause; which said bond is in the words and figures following, to wit:

Bond.

Know all men by these presents that we, Simeon F. Hall, William Hall, George W. Stitt, and Joseph A. Sleeper, are held and firmly bound unto John H. Cordell and William F. Dunnica in the full and just sum of eight thousand and five hundred dollars, to be paid to the said John H. Cordell and William F. Dunnica, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs,

executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-eighth day of January, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at a circuit court of the United States for the northern district of Illinois, in a suit depending in said court between John H. Cordell and William F. Dunnica, plaintiffs, and the said Simeon F. Hall, William Hall, and George W. Stitt, defendants, judgment was rendered against the said Simeon F. Hall, William Hall, and George W. Stitt in the said circuit court of the United States for the northern district of Illinois, and they, the said

57 Simeon F. Hall, William Hall, and George W. Stitt, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said John H. Cordell and William F. Dunnica, citing and admonishing them to be and appear at a supreme court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Simeon F. Hall, William Hall, and George W. Stitt shall prosecute their said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

SIMEON F. HALL. [SEAL.]
WM. HALL. [SEAL.]
G. W. STITT. [SEAL.]
JOSEPH A. SLEEPER. [SEAL.]

Approved by—
H. W. BLODGETT, *Judge.*

Endorsed: Filed Jan. 28, 1888. Wm. H. Bradley, clerk.

58 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record of all the proceedings had in said court in the cause wherein John H. Cordell and William F. Dunnica are the plaintiffs and Simeon F. Hall, William Hall, and George W. Stitt are the defendants as the same appears from the files and records of said court now remaining in my custody and control.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office, in Chicago, in said district, this twenty-fifth day of April, 1888.

WM. H. BRADLEY, *Clerk.*

59 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you, in said circuit court, between Simeon F. Hall, William Hall, and George W. Stitt, plaintiffs in error, and John H. Cordell and William F. Dunnica, defendants in error, in an action of assumpsit, a manifest error hath happened, to the great damage of the said Simeon F. Hall, William Hall, and George W. Stitt, plaintiffs in error, as by their complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1888, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal of Circuit Court, U. S., Northern Dist. Illinois, 1855.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 28th day of January, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the 112th year.

WM. H. BRADLEY,
Clerk of the Circuit Court of the United States for the Northern District of Illinois.

[Endorsed:] Supreme Court of the United States. Simeon F. Hall, William Hall, & George W. Stitt, plaintiffs in error, *vs.* John H. Cordell and Wm. F. Dunnica, defendants in error. Writ of error. Copy deposited for the defendants in error in the clerk's office U. S., northern district of Illinois.

60 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

To John H. Cordell and William F. Dunnica, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1888, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Simeon F. Hall, William Hall, and George W. Stitt are plaintiffs in error and you are defend-

ants in error, to show cause, if any there be, why the errors in the judgment mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry W. Blodgett, judge, this twenty-eighth day of January, in the year of our Lord one thousand eight hundred and eighty-eight.

H. W. BLODGETT, *Judge.*

J. A. SLEEPER,
Attorney for Plaintiffs in Error.

61 [Endorsed:] Supreme Court of the United States. Simeon F. Hall *et al.*, pl'ffs in error, *vs.* John H. Cordell *et al.*, def'ts in error. Citation to October term, A. D. 1888. J. A. Sleeper, att'y for pl'ff- in error. The within notice served on us this 28th day of August, 1888, & service accepted. J. M. Flower & C. L. Holstein, att'ys for def'ts in error. 1066.

Endorsed on cover: N. Illinois C. C. U. S. No. 90. Simeon F. Hall, William Hall, and George W. Stitt, plaintiffs in error, *vs.* John H. Cordell and William F. Dunnica. Filed September 7, 1888.

Office Supreme Court, U. S.
FILED,
NOV 1 1891
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES,

SIMEON F. HALL, WILLIAM HALL AND GEORGE W. STITT,
Plaintiffs in Error,
vs.
JOHN H. CORDELL AND WILLIAM DUNNICA,
Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

J. A. SLEEPER,
For Plaintiffs in Error.

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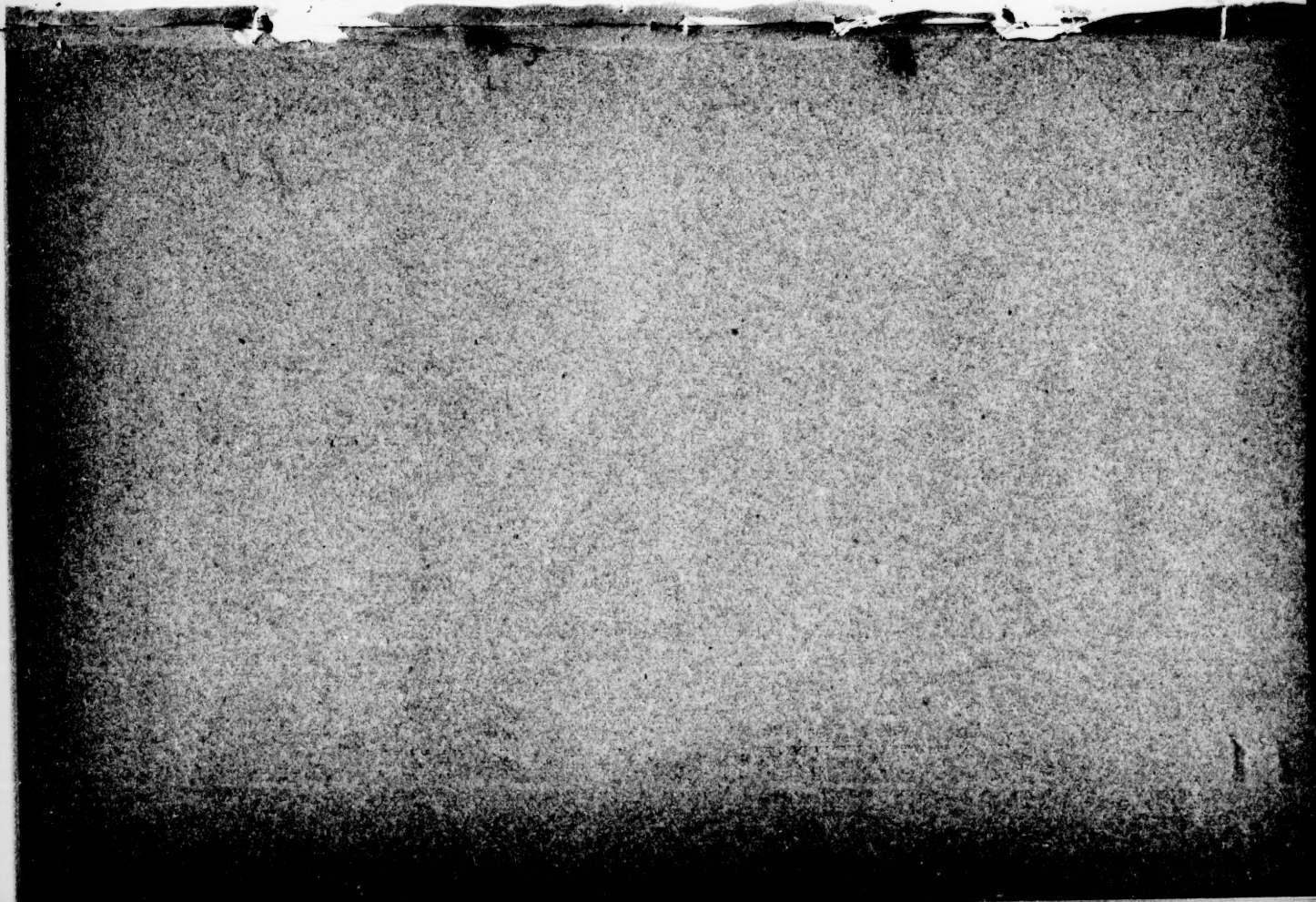

IN THE

SUPREME COURT OF THE UNITED STATES.

SIMEON F. HALL, WILLIAM HALL AND GEORGE W. STITT,
Plaintiffs in Error,
vs.
JOHN H. CORDELL AND WILLIAM DUNNICA,
Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This was an action of assumpsit, brought by the defendants in error against the plaintiffs in error, in the Circuit Court of the United States for the Northern District of Illinois.

1. The plaintiffs' declaration, as originally filed, contained three counts, the first averring that January 1, 1886, plaintiffs were engaged in the business of banking and made an agreement with the defendants that they would cash all drafts or bills of exchange drawn by one George Farlow, on the defendants, on account of shipment of cattle then purchased by Farlow and consigned to the defendants; that the defendants, on receipt of the drafts or bills of exchange, would honor the same on account of said shipment of cattle.

That in pursuance of that agreement plaintiffs had, upon presentation of such drafts or bills of exchange, drawn by Farlow on defendants, payable to the order of plaintiffs, cashed the same, paid over the proceeds to Farlow, forwarded the drafts or bills of exchange to the defendants, who, upon presentation thereof, accepted and paid them.

That July 13, 1886, Farlow presented a draft, payable to the order of plaintiffs, and directed to the defendant, for the sum of $11,272, which the plaintiff cashed, paid over the proceeds to Farlow and forwarded the draft to defendants to be paid upon the receipt thereof by them.

That that draft was received by the defendants as well as nine loads of cattle and one load of hogs, which were consigned by Farlow to defendants, to be sold by them under the arrangements aforesaid.

That the defendants refused to honor or pay the draft, and never have paid it.

The second count is on a bill of exchange, drawn by George Farlow, July 13, 1886, at Marshall, Missouri, directed to the defendants, for the sum of $11,275, payable to the order of plaintiffs, and accepted by defendants at Chicago, Illinois, July 15, 1886, which was never paid by defendants.

The third count was the common counts for money loaned by plaintiffs to defendants, paid, laid out and expended, and had and received by the defendants, to and for the use of the plaintiffs, and for goods, wares and merchandise, labor, etc.

An amended count, filed November 28, 1887, by leave of court averred—

1. That January 1, 1886, plaintiffs were and since have been engaged in the business of banking at Marshall, Missouri.

2. That defendants were then and since have been engaged in the business of live stock commission merchants at the Union Stock Yards, Cook county, Illinois.

3. That March 31, 1886, an agreement was entered into, between defendants and George Farlow, that Farlow should, from time to time, ship to defendants live stock, to be sold

by defendants as commission merchants, and that Farlow should at the time of such shipments, draw drafts or bills of exchange on defendants, payable to the order of plaintiffs, to cover the *price* of live stock so shipped, and that defendants would accept and pay, or pay all drafts or bills of exchange so drawn.

4. That said agreement was before and at the time of the transaction thereafter complained of in the count, reported and communicated by said parties to said plaintiffs, and by plaintiffs believed and relied upon.

5. That in pursuance of said agreement, and on July 13, 1886, Farlow shipped to defendants nine loads of cattle and one car load of hogs, and drew a draft or bill of exchange on defendants, against the same, for the sum of $11,274, payable to the order of plaintiffs.

6. That said draft was presented by Farlow to plaintiffs for discount, according to said agreement for discounting, and plaintiffs, relying upon the agreement and believing that the draft would be accepted and paid by defendants according to said agreement, discounted the draft, paid Farlow the full value therefor, and caused the draft to be forwarded to defendants for acceptance and payment.

7. That the draft was duly presented to defendants for acceptance and payment, the nine car loads of cattle and one car load of hogs duly received and sold by the company, and proceeds therefrom received by him; that defendants refused to accept the draft or bill of exchange or to pay the same and have ever since done so.

DEFENDANTS' PLEAS.

1. Non-assumpsit.

2. To the first count in the original declaration and to the additional count, "That the promises and undertakings of the defendants therein stated and alleged to accept or pay the said drafts of George Farlow, made on them, if any such were made, were not made in writing; that they were made in the State of Missouri and not elsewhere, and that in and by the statutes of the said State of Missouri,

to-wit, Chapter 10 of the Revised Statutes of the State of Missouri, entitled, Bills of Exchange and Negotiable Promissory Notes, the same being a public statute of such State. Acceptances of bills of exchange are required to be in writing in order that any person shall be charged as acceptor thereof, and all promises to accept bills of exchange made before the same are drawn, are also required to be in writing, and to be unconditional in order to be binding on the person making the same.

PLAINTIFFS' REPLICATION.

The plaintiffs reply:

1. "That the promise of the defendants in the declaration mentioned, was an original promise of and undertaking by defendants to plaintiffs to pay drafts or bills of exchange drawn on defendants by George Farlow, in favor of plaintiffs, and discounted by them, which said promise was to be performed by defendants in the State of Illinois, where defendants resided and where this suit is instituted and is now pending."

2. Second replication: "That the said draft was drawn by said George Farlow and discounted by plaintiffs, on the faith of said promise of defendants that they would pay the same."

That "the money thereon paid by plaintiffs to said Farlow, the amount thereof being the face of said draft, was used by said Farlow in purchasing nine car loads of cattle and one car load of hogs; all of which facts the defendants well knew at the time they received said live stock as hereafter stated."

"That said cattle and hogs were, at the time said draft was forwarded for payment, consigned to defendants for sale by them, and were received by defendants and sold by them, and they received the proceeds thereof, amounting to about $11,000, and thereby the defendants became bound to pay said draft."

Defendants' Demurrer.

The defendants demurred to each of said replications separately. To the first replication that it is not sufficient in law for the plaintiffs to maintain their action in respect of said counts mentioned in the plea, and assigned the following causes:

1. The replication does not state facts sufficient to answer the said plea.

2. The replication is a departure from the matters contained in said first count mentioned in said plea.

3. The replication is a departure from the matters contained in the count filed at this same term of October and mentioned in said plea.

To the second replication, that it and the matters and things therein contained are not sufficient, in the law, for the plaintiffs to have or maintain their action in respect to said counts, and assign causes as follows:

1. The replication does not state facts sufficient to answer the said plea.

2. The replication is a departure from the matters contained in the said first count mentioned in said plea.

3. The replication is a departure from the matters contained in the count filed at this same term of October, and mentioned in said plea.

Bill of Exceptions.

Plaintiffs' Evidence.

1. A bill of exchange as follows:

$11,274.00. Marshall, July 13, 1886.

Pay to the order of Cornell and Dunnica eleven thousand two hundred and seventy-four dollars—nine car loads of cattle and one load of hogs.

George Farlow.

To Hall Bros. & Co., Union Stock Yards, Chicago, Ill.

2. Protest of said draft in writing by notary public, for non-payment July 15, 1886, under seal.

Admission that draft was presented to defendants on that day, payment demanded and refused.

3. Testimony of witnesses tending to prove that Farlow, April 1, 1886, was engaged in the business of buying live stock, at Marshall, and elsewhere in Missouri, shipping the same to Chicago to be sold on the market at the Union Stock Yards, and had been so engaged for many years.

4. That defendants were live stock commission men at said Union Stock Yards, receiving live stock consigned to them at said stock yards, and selling it for the owners for a commission paid to them.

5. That plaintiffs, for many years, had been bankers at Marshall, in Missouri; that Farlow, during March, 1886, purchased live stock in Missouri, shipped it to defendants at Union Stock Yards for sale—made several such shipments.

6. That for many years Farlow had done business with plaintiffs as his bankers; when he made the shipments, in March, he drew drafts for the live stock on defendants, at union stock yards, Chicago, payable to plaintiffs' order; that they took the drafts and paid the money for which the drafts were drawn, on checks drawn on them by Farlow, in favor of the persons from whom he bought the live stock.

7. That defendants had received the stock, sold it on the market for the account of Farlow, paid all the drafts drawn on them when presented; that William Hall, one of the defendants, was at Marshall, Missouri, April 1, 1886.

8. The counsel for the plaintiffs then offered to prove, by witnesses, that in a conversation between Cordell, one of the plaintiffs, and William Hall, Hall for his firm, had verbally agreed that they would pay all the drafts drawn by George Farlow, in favor of the plaintiffs, on Hall Bros. & Company, for the cost of live stock which Farlow should buy and ship to the union stock yards and consign to them at the union stock yards.

The counsel for the defendants objected to such evidence being given, on the ground that it was incompetent, because by the statutes of the State of Missouri, in force at that time,

to-wit, Chapter 10 of the Revised Statutes of the State of Missouri, entitled "Of Bills of Exchange and Promissory Notes," acceptance of bills of exchange are required to be in writing, in order that any person shall be charged as acceptor thereof, and all promises to accept or pay any bill of exchange, before the same are drawn, are also required to be in writing and to be unconditional in order to be binding on the person making the same, and the counsel produced and read to the court the said statute. Court overruled the objection and allowed the evidence to be given, and the counsel for the defendants excepted.

The sections of the statute referred to and read to the court are as follows:

CHAPTER 10.

OF BILLS OF EXCHANGE AND NEGOTIABLE PROMISSORY NOTES.

SEC. 533. ACCEPTANCE OF BILLS OF EXCHANGE MUST BE IN WRITING.—No person within this State shall be charged as an acceptor of a bill of exchange, unless his acceptance shall be in writing, signed by himself or his lawful agent. (G. S. 395, Sec 1a.)

SEC. 534. ACCEPTANCE WRITTEN ON SEPARATE PAPER WILL BIND ACCEPTOR, WHEN.—If such acceptance be written on a paper other than the bill, it shall not bind the acceptor, except in favor of a person to whom such acceptance shall have been shown, and who, upon the faith thereof, shall have received the bill for a valuable consideration. (G. S. 395, Sec. 2.)

SEC. 535. AN UNCONDITIONAL PROMISE TO ACCEPT DEEMED AN ACCEPTANCE, WHEN.—An unconditional promise in writing, to accept a bill before it is drawn, shall be deemed an actual acceptance in favor of every person to whom such written promise shall have been shown, and who, upon the faith thereof, shall have received the bill for a valuable consideration. (G. S. 395, Sec. 3b.)

9. The further testimony of the plaintiff tended to prove that William Hall, one of the defendants, at Marshall, in

the State of Missouri, made "a verbal agreement with the plaintiffs that his firm of Hall Bros. & Company would pay all drafts drawn by George Farlow, in favor of plaintiffs, on Hall Bros. & Company for the cost of live stock bought by him, Farlow, and shipped and consigned to Hall Bros. & Company at the Union Stock Yards, Chicago, Illinois.

10. The counsel for the plaintiffs gave further evidence tending to show that between April 1 and July 13, 1886, Farlow bought, in Missouri, a large number of cattle, hogs and live stock, and shipped them to the Union Stock Yards, Chicago, Illinois, consigned to Hall Bros. & Co., amounting to as many as thirty-five or forty shipments; that Hall Bros. & Co. received the shipments and sold the stock as commission men for Farlow; that in each case, after the live stock was weighed and on board the cars, Farlow drew his drafts for the cost of the live stock so shipped, on Hall Bros. & Co., at the union stock yards, Chicago, payable to plaintiffs or order; that plaintiffs received the draft, paid out the money mentioned in it on George Farlow's checks to parties from whom he had purchased the stock, and for the expenses of shipping; that plaintiffs sent the drafts to Chicago for collection and in every instance Hall Bros. & Co. paid the draft on presentation; that July 13, 1886, George Farlow shipped at Blackburn, Missouri, to the Union Stock Yards, Chicago, nine car loads of cattle and one car load of hogs, consigned to Hall Bros. & Co., sold by them for account of Farlow, proceeds received by them; that the draft read in evidence was drawn by Farlow, discounted by the plaintiffs, the amount of the draft credited to Farlow on their books, and by them paid out on Farlow's checks, given to parties from whom he had bought the cattle and hogs, and for expenses incurred in shipping the cattle, etc.; that the draft covered the cost only to Farlow, of said live stock; that Cordell and Dunnica sent the draft forward for collection; it was presented to Hall Bros & Co. for payment; they refused to pay

it; it was protested for non-payment. After the draft had been protested plaintiffs received from the proceeds of these cattle and hogs $5,936.55, that being the amount of the net proceeds of the cattle and hogs received by Hall Bros. & Co. after taking from the gross proceeds the freight on the shipment, the expenses of feeding the stock on the way and at the stock yards, the stock yards charges, charges of persons coming with the stock, and the commissions on the sale and the amount owing by Farlow to Hall Bros. & Co. for moneys paid by them on his drafts, over and above the net proceeds from live stock received by them from him and sold for him on the market, and $2,000 due them on notes, given by Farlow to defendants for money loaned to him by them.

DEFENDANT'S EVIDENCE.

The defendants' evidence tended to show that William Hall did not make the verbal agreement with Cordell and Dunnica, as testified to by witnesses on the part of the plaintiffs.

That William Hall had no conversation with Cordell and Dunnica, or either of them, on the subject of the purchase of cattle or live stock by Farlow, or the shipment or consignment of it to Hall Bros. & Co. at the union stock yards for sale, or the payment of drafts drawn by Farlow on them.

That the occasion of William Hall going to and being in Marshall, Missouri, was that Farlow had applied to Hall Bros. & Co. to borrow $2,000 on his note and the note of some other person.

That Cordell and Dunnica had sent the note to Hall Bros. & Co., and had recommended the parties as good and the note good security for the loan.

That on receiving the note and letter from Cordell and Dunnica, William Hall went to Missouri to make personal inquiries about the parties, saw Cordell and talked with him about making that loan, and refused to make it.

That after the conversation with Cordell, Hall saw Farlow, and told him he would not make the loan then.

That Farlow then told Hall he had some ninety-two head of cattle on which he had made some payments, which he offered to ship and consign to Hall Bros. & Co., for sale, against which he wished to draw.

That William Hall then agreed with Farlow, if he would ship those cattle and draw against them for the cost, less what he had already paid on them, and if the cattle came in time to meet the draft and they were as represented by Farlow, Hall Bros. & Co. would sell the cattle and pay the draft.

That that was the only agreement made there at Marshall as to shipment of live stock by Farlow to Hall Bros. & Co.

That those cattle were afterward shipped, not in the name of George Farlow, but in the name of his brother, William E. Farlow; the draft against them was drawn by George Farlow in the name of Cordell and Dunnica.

That the cattle netted some $300 more than the amount of the draft; the proceeds of the cattle were credited to George Farlow on the books of Hall Bros. & Co., the draft paid, and the amount charged to George Farlow in his account.

That the course of business at the stock yards was and is that live stock is received there, subject to freight, expenses of feeding it on the way, of the persons who accompany it, for feeding at the yards and the charges of the stock yards company.

That the consignee pays all these charges, charges them with his commissions to the consignors, deducts the amount from the gross sales and the balance is the net proceeds of the sale.

That the course of doing the business between Hall Bros. & Co. and Farlow was to credit him with the gross proceeds of each shipment, charge him with the money paid upon it for freight and other expenses and their commissions, and upon payment of his draft to charge him with that money also.

That when William Hall was in Marshall, April 1, 1886, George Farlow was indebted to Hall Bros. & Co.

That between April 1 and July 13, 1886, the proceeds of live stock shipped by Farlow and consigned to Hall Bros. & Co., were not sufficient to pay the moneys, so that on July 13th, Farlow was indebted to Hall Bros. & Co., $4,165.72, which included the $2,000 loaned by them to him.

That July 15, 1886, Hall Bros & Co. received nine car loads of cattle and one car load of hogs, shipped by Farlow from Blackburn, Missouri; there were 145 cattle and 63 hogs. Hall Bros. & Co. sold them on the market at the stock yards, for account of Farlow; the gross proceeds were $10,758.46; Hall Bros. & Co. paid, on account of that shipment, as follows:

Freight, including feed on road	$525 00	
Yardage	41 29	
Hay	6 75	
Corn	2 00	
Inspection	15	
Cash advanced shipper	2 50	
Their commissions on sale	78 50	
		656 19
Net proceeds		$10,102 27
Hall Bros. & Co. on that day deducted from this net proceeds Farlow's debt on their books		4,165 72
Leaving a balance due him of		$ 5,936 55.

Hall Bros. & Co. on the next day paid that money to the plaintiffs by depositing it in bank with their correspondent, to their credit, for use of George Farlow, which they afterwards received.

I have made the statement thus full, not because I expect the court will review the facts, but that it seemed necessary to me that I might present more clearly the questions of law in the case.

INSTRUCTIONS ASKED BY DEFENDANTS.

The defendants prayed the court to give certain instructions to the jury, eight in number; they appear at length on pages 18, 19 and 20 of the printed record.

The court utterly refused to give the first two of said instructions asked, and to the refusal of the court to give each or either of them the defendants excepted.

ASSIGNMENT OF ERRORS.

And the said plaintiffs in error say that in the proceedings in said cause and in giving judgment therein in and by said Circuit Court, there is manifest error in this, to wit:

1. That the said Circuit Court overruled the demurrers of the said plaintiffs in error to the replication of the defendants in error to the pleas of the said plaintiffs in error, when the judgment thereon ought to have been given for the plaintiffs in error. Pages 8, 9, 10, 11 and 12 printed record.

2. The said Circuit Court erred in overruling the objection of the plaintiffs in error to the giving of evidence by the defendants in error, as proposed by them at page 15 of the printed record, and on page 35 of the original record, and in permitting the defendants in error to produce and give to the jury the evidence set out at the foot of page 15, and on page 16 of the printed record, against the objection of the plaintiffs in error.

3. The said Circuit Court erred in refusing to give the following instruction asked by the plaintiffs in error:

"1. That the oral agreement to which the plaintiffs and their witnesses have testified, under the statute of Missouri, was not valid and binding on the defendants, if it was made in Missouri, because it was not in writing."

4. The said Circuit Court erred in refusing to give the following instruction to the jury, as asked by the defendants:

"2. That the entire evidence in this cause is hereby excluded and you should bring in a verdict for the defendants."

5. The said Circuit Court erred in refusing to give to the jury each of the instructions asked by the defendants, numbered 3, 4, 5, 6, 7 and 8, and set out at length at pages 19 and 20 of the printed record, and in not instructing the jury upon the points of law made by each of said instructions.

6. The said Circuit Court erred in giving the following instruction to the jury:

"7. It is for you to say, in the light of the testimony here, whether the defendants did agree, as is charged in this case, that they would pay these Farlow drafts that should be drawn, and you will say where the preponderance of the proof lies. You are the judges. You have heard the witnesses testify. You have seen them here in court; you are to say where the preponderance of the proof lies."

"If you find, from the proof, that Mr. William Hall, one of the firm, agreed with the plaintiffs to pay these Farlow drafts, drawn against the live stock shipped by him to the defendants, that the draft in question was so drawn, and that the defendants have refused to pay said draft, then the defendants are liable for the amount unpaid on this draft."

7. The said Circuit Court erred in giving the following instruction to the jury:

"9. You can not find for the plaintiffs upon this aspect of the plaintiff's case, unless you find from the proof that the defendants did agree to pay these drafts as they should be drawn upon the defendants by Farlow and cashed by the plaintiffs. If you do find that this agreement was made then the defendants are liable in this case for the unpaid portion of this draft, which is $5,337.45, and interest on the amonnt from the 15th of July, 1886, to the present time."

8. The said Circuit Court erred in charging the jury as follows:

"11. If you are satisfied from the proof that the nine car loads of cattle and the one car load of hogs mentioned in this draft, for you will observe the draft itself upon its

face shows nine car loads of cattle and one car load of hogs, and you are to construe in the light of all the testimony that it was drawn against the nine car loads of cattle and one car load of hogs shipped, out of which proceeds the draft is to be paid—if you are satisfied from the proof that the nine car loads of cattle and one car load of hogs mentioned in this draft as shipped by George Farlow and bought by him, was purchased by Farlow with money obtained from the plaintiffs, with the agreement that the plaintiffs were to be paid for their advance on such cattle out of the proceeds of such cattle when sold by the defendants as Farlow's brokers, and that the defendants knew about that—that is, that the defendants knew in the course of business between the plaintiffs and George Farlow and themselves and from other sources, that Farlow had obtained the money to pay for said cattle from plaintiffs, and had appropriated the proceeds of said shipments to the payment of said drafts—then the defendants, as Farlow's brokers, had no right to apply any part of the proceeds of said cattle to the payment of the debt of Farlow to themselves until the draft was fully paid."

9. The said Circuit Court erred in charging the jury as follows:

"13. Now, if you are satisfied that the defendants knew that Farlow had obtained advances from the plaintiffs upon these cattle, and that he had appropriated the proceeds of these cattle to the payment of those advances by this draft, then the defendants had no right to appropriate those proceeds to the payment of their own debt against Farlow, so that in this aspect of the case, if you find from the proof that Farlow had appropriated, with the knowledge of the defendants, to the payment of said draft, the proceeds of these cattle, then the defendants are liable for this $4,165.72 which they applied to the payment of their own debt against Farlow."

10. The said Circuit Court erred in charging the jury as follows:

"14. You are to infer, or rather you are to say, whether, from the evidence in this case as to the course of business

and dealings between the defendants and Farlow and between the plaintiffs and the defendants themselves the deendants knew of the dealings between Farlow and the bank, whether they did or not know Farlow had advanced money from the plaintiffs upon these cattle."

11. The said Circuit Court erred in charging the jury as follows:

"15. In considering this aspect of the case you are to say whether the evidence shows that Mr. William Hall, at the time he visited Marshall, Missouri, in the spring, found Farlow to be a man of means and enabled to make purchases of such a shipment of cattle as this was, or whether some one had made the advances by which these cattle were purchased, and found that somebody's money besides Farlow's was invested."

12. The said Circuit Court erred in charging the jury as follows:

"16. When this draft came, you are to say whether that itself was not notice to them that this was plaintiffs' money that had purchased these cattle, because that refers to the cattle in the draft itself."

13. The said Circuit Court erred in charging the jury as follows:

"17. You will remember that the testimony is, and perhaps it may be said to be undisputed, that the defendants knew that Farlow was not a man of means enough necessary to carry on such a stroke of business as he had been carrying on and making such purchases as this shipment indicated."

14. The said Circuit Court erred in charging the jury as follows:

"18. To recapitulate, if you find the contract which is set out in this declaration, that the defendants agreed to pay these drafts, is proven, then the defendants are liable for the full amount unpaid in the draft, with interest at six per cent."

15. The said Circuit Court erred in charging the jury as follows:

"19. If you find that this branch of the case is not made out, but do find that the defendants knew that the plaintiffs had advanced their money on these cattle, and that Farlow had appropriated the proceeds of them to the repayment of those advances, then you will find the defendants liable for the amount of money which they then appropriated, $4,165.72, and interest on that from the time they appropriated it, which would be the time they received it, the 15th of July.

16. The said Circuit Court erred in overruling the motion of the plaintiffs in error for a new trial.

17. The said judgment ought to have been given for the plaintiffs in error instead of for the defendants in error.

Wherefore the said judgment ought to be reversed.

Argument.

I.

The second plea of the plaintiffs in error to the first count in the declaration, as originally filed and to the additional count filed at the October term of said court, presented a good defense to the said counts and to the replications filed thereto, by the defendants in error, was no answer to that plea, and the demurrers to them ought to have been sustained.

1. The said first count in the declararation was upon the alleged agreement made by defendants, that plaintiffs would, in the course of dealings between Farlow and the defendants, cash all drafts or bills of exchange, drawn by Farlow on account of shipment of cattle *then* purchased by Farlow and consigned to defendants, and that defendants, on receipt of said drafts or bills of exchange, would honor the same on account of said shipments of cattle.

2. The plea set up as a defense, the statute of Missouri requiring agreements of that kind to be in writing.

3. The first replication averred that the agreement, in the declaration mentioned, was an original promise to be

performed in the State of Illinois. This was no answer to the plea if the verbal promise was a nullity under the statutes of Missouri.

That it was a nullity see the statutes of Missouri and—

Fluto v. *Mulhall*, 4 Mo. appeal. 476.
Fluto v. *Mulhall*, 72 Mo. 522.
Rousch v. *Duff*, 35 Mo. 312.
Valle v. *Cerre*, 36 Mo. 575.
Ford v. *Angelrode*, 37 Mo. 50.

4. The second replication avers that the draft was discounted by the plaintiffs, and the money mentioned in it was used by Farlow in purchasing nine car loads of cattle and one car load of hogs, which defendants knew; that the hogs and cattle were consigned to defendants for sale by them at the time the draft was forwarded for payment; that defendants received them and sold them and received the proceeds thereof.

5. Each of those replications admit that the pretended agreement was made in the State of Missouri; that it was verbal and not in writing, and that the statutes of Missouri were as stated in the plea.

True it is, that, whether the replication had admitted or denied the provisions of the statute of Missouri, the Circuit Court and this court take judicial notice of this statute. It may be necessary at times to *refresh the judicial mind* by reading the statute, but it knows its provisions *all the same*.

6. The laws of the State of Missouri, where the pretended contract was made, govern its construction and validity. If the laws of Missouri, at the time when this verbal agreement was made, required agreements to accept bills of exchange to be in writing, that law governed the Circuit Court in determining whether any contract was made or not, or whether any contract existed.

Bond v. *Bragg*, 17 Ill. 69.
Stacy v. *Baker*, 1 Scam. 417.
Adams v. *Robertson*, 37 Ill. 45.
Evans v. *Anderson*, 78 Ill. 558.

7. Each of said replications was a departure from the counts in the declaration to which the plea was filed.

II.

It was not competent for the plaintiffs to prove, on the trial of the case, or to give any evidence of, a verbal agreement to accept the draft on which the suit was brought.

The counsel for the defendants below objected to such evidence, the court overruled the objection and the defendants excepted. The same authorities are applicable to this point as to the point on overruling the demurrer to the replications.

The offer to give the evidence and the objection thereto and the ruling of the court are on page 15 of the printed record, 35 original record.

III.

1. There is no evidence in the record and none was produced on the trial tending to prove the agreement between George Farlow and the defendants, set out in the additional count, found at the foot of page 6 of the printed record, to wit: That on or about the 31st day of March, 1886, an agreement was entered into between said defendants and George Farlow, by which it was promised and agreed by defendants that Farlow should, from time to time, ship to defendants live stock, to be sold by them as commission merchants, and that Farlow, should, at the time of such shipments, draw drafts or bills of exchange on defendants, payable to the order of plaintiffs, to cover the price of live stock so shipped, and that defendants would accept and pay all drafts or bills of exchange so drawn.

2. The evidence offered by the plaintiffs on the trial was, "that in a conversation between Cordell, one of the defendants, and said William Hall, he, Hall, for his firm, had verbally agreed that they would pay all the drafts drawn by George Farlow, in favor of plaintiffs, on Hall Bros. & Co. for the cost of live stock which Farlow should buy and

ship to the union stock yards, and consign to them, Hall Bros. & Co."

3. That evidence was objected to, the objection overruled, and exception by defendants.

4. The evidence given by the plaintiffs, under such ruling, "tended to prove that William Hall did, at Marshall, in the State of Missouri, on or about April 1, 1886, make a verbal agreement with the plaintiffs that his firm of Hall Bros. & Co. would pay all drafts drawn by George Farlow, in favor of plaintiffs, on Hall Bros. & Co., for the cost of live stock bought by him, Farlow, and shipped and consigned to Hall Bros. & Co., at the Union Stock Yards, Chicago." This does not by the least or thinest shade of shadow refer to any contract between Farlow and the defendants.

5. The agreement, as set out in the first count of the declaration on page 3, printed record, is—

1. "Wherein and whereby it was agreed that plaintiffs would in the course of dealings between said defendants and one George Farlow * * * cash all drafts or bills of exchange drawn by said Farlow upon the said defendants, on account of shipment of cattle *then* purchased by said Farlow and consigned to the said defendants, and who, upon the receipt of said drafts or bills of exchange, would then and there honor the same, on account of said shipments of cattle."

6. The evidence given on the trial, of the verbal contract, did not prove nor tend to prove the contract as set out in the first count of the declaration.

7. As set out in the first count of the declaration, the contract was (*a*), that plaintiffs, in the course of their dealings between defendants and Farlow, would cash all drafts or bills of exchange drawn by Farlow, on the defendants, on account of shipment of cattle *then* purchased by Farlow and consigned to defendants, and that defendants, upon receipt of said drafts or bills of exchange, would *then* and *there* honor the same, on account of said shipments of cattle aforesaid.

There is no evidence of any such agreement by plaintiffs as this count sets out, and the evidence given does not sustain the first count even if that verbal promise was binding, which it was not.

8. The evidence offered and given was of a verbal agreement on the part of the defendants, made with the plaintiffs, that they would pay all drafts drawn by George Farlow in favor of plaintiffs, on Hall Bros. & Co., *for the cost of live stock*, which Farlow should buy and ship to the union stock yards and consigned to Hall Bros. & Co.

9. There is nothing in the evidence to show or which tends to prove an agreement on the part of plaintiffs to cash drafts for Farlow drawn on defendants.

10. By the agreement, as set out in the declaration, the drafts were to be made on account of shipment of cattle *then* purchased by Farlow and consigned to defendants. The evidence was of an agreement to pay all drafts drawn by Farlow in favor of plaintiffs, *for cost of live stock* bought by Farlow and shipped and consigned to defendants at the Union Stock Yards, Chicago.

There is not, I repeat, a particle of evidence tending to prove that the plaintiffs agreed with the defendants to cash drafts drawn on defendants by Farlow as alleged in the first count.

11. So we see that the evidence does not sustain the first count in the declaration, nor the additional count in the declaration, even if it were true as matter of law that the verbal promise attempted to be proven was not a nullity under the Missouri statutes.

12. There is no evidence in the case competent to prove that the defendants agreed to accept or pay this draft offered in evidence and mentioned in the declaration. On the contrary, the proof is, that they refused either to accept or pay it.

13. As we have seen by reference to the Missouri statute and the decisions of the courts of Missouri under that statute, that the verbal promise was a nullity, and by reference to the decisions of the Supreme Court of Illinois, that it

depends entirely upon the Missouri statute, whether that promise was binding on defendants in the State of Illinois; that it is clear, as a rule of law, that until there had been a binding contract made between the parties in Missouri there was none in Illinois which the courts would enforce; that as the verdict and judgment in this case were given for the whole amount unpaid on the draft, with interest, there would not seem to be much question that the judgment must be reversed.

IV.

The Defendants' Instructions as Asked and Refused, and the Charge of the Court.

The defendants were, in law, and on the score of fair dealing by the court below with their case, entitled to have had all their instructions, as asked, substantially given to the jury, whereas, by the refusal to give any of the instructions asked, and by the charge of the court as given, the jury were obliged, if they followed the spirit of the instructions of the court, if not the letter, to give a verdict against the defendants. There were questions of fact which ought to have been submitted to that jury, and they ought to have been permitted to pass upon those questions of fact, under proper instructions of the court as to the law, without being told to find against the defendants and for the plaintiffs, as they virtually were.

1. Inasmuch as the statute of Missouri made the pretended agreement, set out in the declaration, and attempted to be proved by the evidence, void, because not in writing, the court below ought to have so instructed the jury as requested by defendants in their first instruction.

2. Inasmuch as the evidence did not tend to prove an agreement between the plaintiffs and the defendants, nor between George Farlow and the defendants, and as there was no evidence tending to show that the defendants were under any obligation whatever to the plaintiffs, to accept that draft or pay it, the court ought to have excluded all

the evidence from the jury and directed them to give their verdict for the defendants, as requested by defendants in their second instruction asked.

3. Instead of giving either the first or second instruction as asked by the defendants, the court, by its charge submitted to the jury, as a question of fact, to find that there was a contract between the plaintiffs and the defendants, or some contract on the part of the defendants arising out of that verbal promise, by which they were obligated to accept and pay that draft, notwithstanding the statute of Missouri, which made all promises not in writing, made before a draft was drawn to accept or pay it, void, notwithstanding the courts of Missouri had uniformly decided that such verbal promises were void, and notwithstanding the rule elementary, that the *lex loci contractus* controls as to the construction and validity of contracts.

4. I ask the court to read the third, fourth, fifth and sixth instructions asked by the defendants, and when read, I submit to your honors that each and every one of them are warranted by the rules of law, by the rules of evidence and by the law governing the conduct of trials before a court and jury. That it was the duty of the court, whenever attention was specifically called to the propositions contained in those instructions, to instruct the jury one way or the other upon each of those propositions, because they are legal propositions, and are proper and necessary to a fair consideration of the evidence submitted to the jury.

5. The judge who tried the case has said in the bill of exceptions, which he signed, and on the 20th printed page, that he did not, nor would give any of the said third, fourth, fifth, sixth, seventh and eighth instructions, further than the charge which he did give to the jury contains the substance of them or any of them.

6. I call your honor's attention to the 1, 2, 3, 4, 5 and 6 paragraphs of the "charge to the jury, as given by the court," page 20, printed record. And I submit that the statement of the evidence there given is not sustained by the bill of exceptions which the judge himself has signed.

That from the beginning to the end of the whole charge the requests, on the part of the defendants, to charge the jury in relation to their duty in considering the testimony of witnesses, and as to determining where the preponderance is or lies, is not touched upon or alluded to by the court, and throughout the whole of it, there appears an effort to lead the minds of the jury to the conclusion that the court was of opinion the plaintiffs were entitled to their verdict and damages for the whole amount of the draft unpaid and interest.

7. In the fifth, sixth and seventh paragraphs of the charge, the court did tell the jury that there was a conflict in the evidence, and that it was their duty to reconcile it, if they could; if not, to say where the preponderance was; that they were judges of the credibility of the witnesses, and not only that, but to say which of them they would believe; but it utterly neglected to give the jury the rules of the law of evidence, proper for them to know in determining their credibility or coming to a conclusion where the preponderance lay, or as to which of them they would believe, as the defendants had requested, and as I think, the court ought to have done. And the court did conclude the seventh paragraph by telling the jury that if from the proof they found that William Hall agreed with the plaintiffs to pay these drafts, drawn against the live stock shipped by Farlow to the defendants, that the draft in question was so drawn against the live stock shipped by him to the defendants, and that the defendants had refused to pay the draft, they were liable for the amount unpaid on it.

8. Your honors will observe that throughout the charge the court tells the jury that they may find an agreement to pay drafts out of a verbal promise made in Missouri, notwithstanding the statute of Missouri, and notwithstanding the contract or agreement set out in the declaration had not been proved by the evidence which appears in the bill of exceptions. I repeat that under the rules of law, elementary, the error of the court in persisting as it did that that verbal promise, if made, even though made in

Missouri, when the statute required it to be unconditional and in writing, was most palpable and flagrant.

9. I know that the court did tell the jury that if they did not find from the evidence that that verbal promise was made, they could not find for the plaintiff on that hypothesis; but I submit that from the language and spirit of the charge the court intended the jury should understand that, in the mind of the court, there was no need to question that that verbal promise was made, nor that the court expected them to find for the plaintiffs on that theory and to assess their damages at $5,337.45 and interest on that amount from July 15, 1886.

10. But the court put another theory to the jury, upon which it told them that if they should fail to give their verdict for the sum of $5,337.45 and interest, but did find another state of facts, which the court elaborated in the charge, they must still find for the plaintiffs and assess their damages at $4,165.72 and interest from July 15, 1886.

11. I call your Honors' attention to page 22 of the printed record and 50 and 51 original, and paragraphs 11, 12, 13 and 14 of the charge of the court.

I submit to your Honors that there is no evidence in the bill of exceptions that warranted the court in suggesting to the jury, that they might find, if the suggestion be not that they should find, *that the defendants knew* that the nine car loads of cattle and one car load of hogs were "*purchased by Farlow, with money obtained from the plaintiffs, with the agreement, that the plaintiffs were to be paid their advance on such cattle out of the proceeds of such cattle when sold by the defendants as Farlow's brokers.*

12. LET US HEAR WHAT THE SCRIPTURE SAITH. At page 16 printed record, and about the middle of page 37 of original record, we read: "That on or about July 13th, George "Farlow shipped at Blackburn, Missouri, a station about "twelve miles from Marshall, to the Union Stock Yards, "Chicago, Illinois, nine car loads of cattle and one car load "of hogs, consigned to Hall Bros. & Co., which were re-

"ceived by Hall Bros. & Co. and sold by them for account "of George Farlow, and proceeds received by them; that "the draft read in evidence was drawn by George Farlow, "discounted by Cordell & Dunnica and *the amount of the* "*draft credited to Farlow on their books*, and by them paid "out on Farlow's checks, given to parties from whom he "had bought the nine car loads of cattle and one car load "of hogs, and for the expenses incurred in shipping the "cattle, etc.; that said draft covered only the cost to Far-"low of said live stock."

13. I have quoted all the evidence as contained in the bill of exceptions on that point. That bill of exceptions is signed by the judge who presided in the court on the trial of this case. He has told you what the evidence tended to prove. I submit that it is not said that it tended to prove that there was *any agreement between the plaintiffs and Farlow, when they discounted this draft for him or gave him credit on their books for the amount, or at any other time*, "that the plaint-"iffs were to be paid their advance on such cattle out of the "proceeds of such cattle, when sold by defendants as Far-"low's brokers."

14. I say that not only is there nothing in the bill of exceptions about any such agreement, but there was never any claim or pretense on the part of the plaintiffs that there was ever any such agreement.

The first count in the declaration purports to set out all the contracts between the plaintiffs and defendants, and between Farlow and the plaintiffs, and there is no claim, pretense or averment of any such agreement in that count, nor any other count in the declaration.

15. The first count avers the making of the contract between the plaintiffs and defendants. It says that, "plaint-"iffs, as was their custom, and in pursuance of the agree-"ment between them and defendants, cashed the draft and "paid the proceeds to Farlow," etc. Then further on in the count, they say that the draft was presented to defendants for acceptance and they accepted it. They relied upon the promise of defendants to accept, to prove the acceptance.

invoking that rule of commercial law, that a previous promise to accept is an acceptance.

Not a word is said, however, of any agreement, express or implied, between Farlow and plaintiffs, that the money placed to Farlow's credit, on cashing that draft, was to be paid out of the proceeds of these cattle, when sold by defendants as Farlow's brokers.

16. The plaintiffs relied entirely on the verbal promise of the defendants to pay drafts drawn by Farlow on them, without reference to the proceeds of sales of live stock, or whether the proceeds equaled the amount of the draft or fell far short of it. They knew that previous shipments had not equaled the drafts, and probably knew that this shipment would not.

Had the plaintiffs looked to the cattle as security for the payment, or intended to have any claim on them for repayment of the money, they would, as they could, have taken an assignment of the bill of lading or shipping bill, attached it to the draft, and forwarded it with it.

17. Why did the court say to the jury what it did in paragraph 17? The only evidence on that point in the bill of exceptions is found on page 16, printed record, near the top. It is: "That Farlow had no unincumbered property, "and that plaintiffs were unwilling to advance money "on Farlow's drafts, unless the defendants would agree to "protect them."

That may show a reason for plaintiffs wishing or requiring defendants' verbal promise to pay the draft, but it does not tend to prove an agreement between Farlow and plaintiffs, that the money they advanced on this draft should be repaid out of the proceeds of these cattle and hogs when sold by defendants as Farlow's brokers. It does not show that the plaintiffs had or were to have any lien on the cattle or on their proceeds.

It rather tends to show that the plaintiffs would not advance money on the security of the cattle or proceeds; would not advance money on the bills of lading or shipping bills, but required Hall brothers' agreement to pay, and

that they should protect themselves by the proceeds of the live stock bought and shipped by Farlow to them, they relying on the live stock shipped, rather than the plaintiffs.

18. It was prejudicial to the defendants' case for the court to tell that jury that it was "undisputed that the de-"fendants knew that Farlow was not a man of means "enough, necessary to carry on such a stroke of business as "he had been carrying on, and making such purchases as "this shipment indicated." It was error to tell the jury this, because it was not warranted by the evidence, and, because the only effect in the case was to unduly affect the minds of the jury adversely to the defendants. I submit that the charge, as a whole, was improper, not warranted by the evidence, and tended to mislead the jury from the real questions in the case.

V.

I make this further point, that admitting (which I do not) that there may be evidence tending to prove or establish the right of the plaintiffs to recover of the defendants the $4,165.72 on the theory of the charge, yet there is also evidence tending to disprove that right. There were disputed questions of facts on that point, to be passed upon by the jury and found for the plaintiffs, before they would be authorized to give their verdict for that money, $4,165.72 and interest on it from July 15, 1886, and this judgment must be reversed.

1. The court submitted two questions of fact to the jury to be passed upon by them.

(*a*) Was there an agreement valid and binding on the defendants, under which they were bound to pay the whole of that draft for $11,274, whether the proceeds of the cattle and hogs amounted to the amount of it or not, or whether after Farlow shipped the cattle and consigned them to defendants, he had exercised the right of stoppage *in transitu*, so that defendants never received them.

(*b*) If there was no such agreement, then were the de-

fendants liable to pay to the plaintiffs the net proceeds of the cattle and hogs, $10,102.72?

2. The court instructed the jury that if they found from the evidence that the verbal promise, which the plaintiffs claimed was made by William Hall to them at Marshall, Missouri, in March or April, 1886, was proved, then they would find there was such a valid and binding contract and the plaintiffs were entitled to recover the whole amount of the draft, $11,274, and interest from July 15, 1886, less what they had already paid notwithstanding the cattle and hogs brought only the sum of $10,758.46, and that the net proceeds of the sale were only $10,102.27.

3. The jury by their verdict have found there was such contract; that the plaintiffs were entitled to recover from the defendants damages sustained by them by reason of the non-performance of that contract the amount unpaid on the draft..... $5,337.45
And interest from July 15, 1886..... ..... 448.34

Making their verdict..... $5,785.79

4. It is evident that the jury have not, by their verdict, passed upon the other question submitted to them so as to find for the plaintiffs on that other issue; or that they were entitled to recover from the defendants, under this second proposition, the..... ..... $4,165.72
And interest would have been..... ..... 350.61

Total would be..... $4,516.33

5. If their verdict has any effect on this second question or issue, or is any finding upon it, it is for the defendants.

6. But I say, in no event can the court reverse the judgment given and allow plaintiffs to remit the excess over $4,516.33, and then affirm the judgment for that latter sum.

J. A. SLEEPER,
For Plaintiffs in Error.

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Supreme Court of the United States.

OCTOBER TERM, A. D. 1891.

No. 90.

SIMEON F. HALL, WILLIAM HALL, AND GEORGE W. STITT, PLAINTIFFS IN ERROR,

vs.

JOHN H. CORDELL AND WILLIAM F. DUNNICA, DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

ASHLEY M. GOULD,
For Defendants in Error.

FRANK P. SEBREE,
HENRY C. McDOUGAL,
Of Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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BRIEF FOR DEFENDANTS IN ERROR.

Statement of Facts.

Briefly stated, the facts are as follows: On or about April 1st, 1886, William Hall, for plaintiffs in error, who are live-stock commission men of Chicago, Illinois, made a parol agreement in Missouri with John H. Cordell, for defendants in error, who are bankers in Fulton, Missouri, to pay all drafts drawn by one Farlow in favor of Cordell & Dunnica on Hall Bros. & Co. at Chicago, Illinois, for the cost of live stock bought by Farlow and shipped to Hall Bros. & Co., Chicago, Illinois. Pursuant to this agreement Farlow, between April 1st and July 13th, made 35 or 40 shipments of

live stock to Hall Bros. & Co. at Chicago, Illinois; the live stock was paid for by money furnished by Cordell & Dunnica on Farlow's drafts drawn on Hall Bros. & Co., in Chicago, Illinois, according to the agreement, and all these drafts were accepted and paid by Hall Bros. & Co. at Chicago, Illinois, whether the live stock in any shipment sold for enough to cover the draft or not. On July 13th, 1886, Farlow made a shipment to Hall Bros. & Co. of live stock which cost $11,274.00; Cordell & Dunnica furnished the money to pay for this shipment as usual, under the agreement aforesaid, by cashing Farlow's draft on Hall Bros. & Co. for the said amount. The shipment and the draft reached Hall Bros. & Co. at Chicago, Illinois, on the same day, July 15th, 1886. The draft was as follows:

"$11,274.00. MARSHALL, *July* 13, 1886.

"Pay to the order of Cordell & Dunnica eleven thousand two hundred and seventy-four dollars—9 car-loads of cattle and one car-load of hogs.

"GEORGE FARLOW.

"To Hall Bros. & Co., Union Stock Yards, Chicago, Ill."

Hall Bros. & Co. received the shipment of cattle, sold the same and appropriated $4,165.72 of the proceeds to pay a debt due them from Farlow. The draft they refused to accept, but they deposited the balance of the proceeds of the live stock which they did not need, $5,936.55, to the credit of Cordell & Dunnica in a Chicago bank. The draft was protested, and Cordell & Dunnica brought this action against Hall Bros. & Co. in the United States circuit court at Chicago for breach of their contract to accept the said draft. The court instructed the jury on two aspects of the case: *First*, that if they believed that William Hall, for his firm, agreed to pay these Farlow drafts against live stock shipped by him to them, that the draft in question was so drawn, and that Hall Bros. & Co. refused to pay it, then Hall Bros. & Co. were liable for the unpaid amount of the

draft, $5,337.45, with interest from July 15th, 1886. *Second*, that if they did not find such an agreement was made, but did find that Hall Bros. & Co. received the shipments knowing that it had been bought with Cordell & Dunnica's money, and that Farlow's draft in their favor was out for the cost thereof, that then Hall Bros. & Co. had no right to appropriate the proceeds of said shipment to pay a debt due them from Farlow, and were liable for the amount so appropriated, $4,165.72.

The jury brought in a verdict for $5,785.79, which established the fact that the agreement sued on was made by Hall Bros. & Co. with Cordell & Dunnica.

From a judgment rendered on this verdict Hall Bros. & Co. have prosecuted this writ of error.

Brief and Argument for Defendants in Error.

Counsel for plaintiffs in error seek a reversal of the judgment in this case on three grounds:

1st. Because the contract, for the breach of which this action was brought, was not in writing, counsel contending that its validity is to be determined by the law of Missouri, and that by the law of that State it was required to be in writing. This point was raised by demurrer to plaintiffs' replication, by objection to parol evidence of the contract, and by request for instructions.

2d. Because of variance between the pleadings and proof.

3d. Because of the refusal of the trial judge to give, as asked, certain formal instructions telling the jury how to weigh the evidence, which counsel claims are not sufficiently embodied in the general charge of the court.

We shall discuss these points in the above order.

I.

1. Under general commercial law a parol promise to accept a non-existing bill of exchange, upon the faith of which the bill when drawn is purchased, is binding upon the promissor and is not within the statute of frauds.

Townsley *vs.* Sumrall, 2 Peters, 170.
Light *vs.* Powers, 13 Kans., 98 (by Brewer, J.).
1 Reed, Statute of Frauds, sec. 62.
Barney *vs.* Newcomb, 9 Cush., 46.

This is the law in Illinois.

Scudder *vs.* Union Nat'l Bank, 91 U. S., at pp. 413 and 414.
Mason *vs.* Dousay, 35 Ill., 429.
Nelson *vs.* First Nat'l Bank, 48 Ill., 36.
Sturges *vs.* Fourth Nat'l Bank, 75 Ill., 595.
St. Louis Stock Yards *vs.* O'Reilley, 85 Ill., at p. 551.

2. But such a parol promise to accept a bill not drawn, describing no particular bill, is not an acceptance of the bill when drawn. It is *a contract to accept*, for the breach of which an action lies.

Boyce *vs.* Edwards, 4 Peters, 111, at p. 123.
Russell *vs.* Wiggin, 2 Story, 237.
Light *vs.* Powers, 13 Kans., 46.
Cassel *vs.* Dows, 1 Blatch., 342.
Nelson *vs.* First Nat'l Bank, 48 Ill., 36.
Franklin Bank *vs.* Lynch, 52 Md., 270, at p. 280.

This distinction between an acceptance and a promise to accept is clearly drawn in the above cases, and is important in the case at bar. This action was upon a contract to accept (see first count and "additional count" of the declaration). The promise of Hall, for the plaintiffs in error, to accept this bill, for the non-acceptance of which this action was brought, was not an acceptance, but a contract to ac-

cept. His promise was not an acceptance of the bills to be drawn pursuant to it, either in Missouri or in Illinois; but it was a *contract*, which, although made in Missouri (where Hall happened to be), *was to be entirely performed in Illinois*, where the promissors resided and where this action was brought. As far as plaintiffs in error are concerned their entire contract was to accept (or pay) bills drawn pursuant thereto. *This was to be done in Chicago, Illinois.* They resided there, the cattle were shipped to that point, and the bill offered in evidence was drawn upon "Hall Bros. & Co., Union stock yards, Chicago, Illinois."

The question in the case is, therefore, as to whether the validity of the contract of the plaintiffs in error is to be determined by the law of Missouri, where it happened to be made, or by the law of Illinois, where it was entirely to be performed.

3. "It is a principle of universal law that in every form a contract is to be governed by the law with a view to which it was made."

Chief Justice Marshall in Wayman *vs.* Southard, 10 Wheat., 1, at p. 48.
Pritchard *vs.* Norton, 106 U. S., 124.
Watts *vs.* Comers, 115 U. S., 353, at p. 362.
Lloyd *vs.* Guibert, L. R., 1 Q. B., 120.

4. When the place where an obligation originates is not the place at which it is to be performed, the presumption is that the parties intended their contract to be governed by the law of the place of performance.

Cox *et al. vs.* United States, 6 Peters, 172, at p. 203.
Bank of U. S. *vs.* Daniel, 12 Peters, 32, at p. 55.
Andrews *vs.* Pond, 13 Peters, 65, at pp. 77 and 78.
Bell *vs.* Bruen, 1 Howard (U. S.), 170.
Pritchard *vs.* Norton, 106 U. S., 124.
Story, Conflict of Laws, 8th ed., sec. 280 and note.

Wharton, Conflict of Laws, 2d ed., secs. 398 and 399.
Parson, Notes and Bills, 3d ed., vol. 1, p. 320.
Byles on Bills, 7th Am. ed., sec. 402.
Lord Mansfield in Robinson *vs.* Bland, 2 Burr., 1077.
N. Y. State Bank *vs.* Gibson, 5 Duer, at p. 583.
Dickinson *vs.* Edwards, 58 Howard Pr., 24.

The language of Lord Mansfield in Robinson *vs.* Bland, *supra*, is frequently quoted on this question. In that case Sir John Bland was sued on a bill drawn in France by himself on himself in England, and accepted by him for a gaming debt. "There are three reasons," said Lord Mansfield, "why the plaintiff cannot recover here upon this bill "of exchange: 1st. The parties had a view to the laws of "England. The law of the place can never be the rule "when the transaction is entered into with an express view "to the law of another country as the rule by which it is "to be governed. * * * Now, here the payment is to be "in England. It is an English security, and so intended "by the parties."

5. If the contract of these parties was void in Missouri, the place of its celebration, but valid in Illinois, the place of performance, they must be presumed to have contracted with reference to the law of Illinois, because persons are not presumed to have contracted with reference to a law which defeats their engagements.

Pritchard *vs.* Norton, 106 U. S., 124.
New Eng. Mort. Co. *vs.* Vader, 28 Fed. Rep., 265, at p. 269.
Bell *vs.* Packard, 69 Me., 111.
Hunt *vs.* Jones, 12 R. I., 266.
Wharton, Conflict of Laws, 2nd ed., sects. 429 and 507.
Phillemore, Int. Law, sec. D. C. L., IV, pp. 470, 471.

To adopt the contrary presumption in this case—that is, that the parties to this suit contracted with reference to the law of Missouri—produces quite lamentable results, for the plaintiffs in error, if they contracted with reference to Missouri law, must have known what that law was and that their contract with defendants in error was void under that law; accordingly their purpose in making the contract was to entrap defendants in error into parting with their money on the faith of a promise which they (plaintiffs in error) knew to be non-enforceable, and when sued for the money to plead the invalidity of their promise. Even their able counsel could not persuade the learned trial judge to adopt such a presumption as to his clients. So the defendants in error are presumed to have known the law of Missouri, under which they lived. To presume that they advanced $11,000 on the faith of Hall's promise, when they knew that under Missouri law it was void, is ridiculous.

On the other hand, to presume that these parties contracted with reference to the law of Illinois, where these obligors resided and where their contract was to be performed, makes their contract valid and their action respectively honorable and sensible.

This principle is also illustrated in several cases in this court, which hold that where parties have contracted for a rate of interest legal by the *lex loci contractus* but illegal by the *lex loci solutionis*, or *vice versa*, their contract will be construed as if made with reference to the law which made it lawful.

Junction R. R. *vs.* Ashland Bank, 12 Wall., 226.
Cromwell *vs.* Sac County, 6 Otto, 51.
Miller *vs.* Tiffany, 1 Wall., 298.

6. The rule that the validity of contracts depends upon the law of the place of performance applies to formalities required by the law of the place of contract, and a parol contract required to be in writing by the law of the place

of its celebration is not therefore invalid in the State where it is to be performed by the laws of which it is good by parol.

Wharton, Conflict of Laws, 2nd ed., sec. 692.
Ludlow *vs.* Van Renselaer, 1 Johns, 94 (cited in Skinner *vs.* Tinker, 34 Barb., 333).
Mason *vs.* Dousay, 35 Ill., 429.
Wynne *vs.* Jackson, 2 Russell, 251.

In Ludlow *vs.* Van Renselaer, *supra*, a note made in France, both parties resident there, was not stamped as required by French law. The Court held that, as it was payable in New York, it was valid: "The parties never contemplated exacting the payment of this note in that country, "and this would form a sufficient excuse here for not adhering to a matter extrinsic and formal as to the contract."

Section 262, Story, Conflict of Laws, is sometimes cited as holding a contrary doctrine. It is clear, however, that the distinguished jurist referred in that section only to contracts to be performed where made, but upon which suit was brought in a foreign forum, for in section 280 he says (referring to sections 242 *et seq.*, including 262): "The rules "already considered suppose that the performance of the "contract is to be in the place where it is made, either expressly or by tacit implication. But where the contract "is, either expressly or tacitly, to be performed in any other "place, then the general rule is, in conformity to the presumed intention of the parties, that the contract as to its "*validity*, nature, obligation, and interpretation *is to be governed by the law of the place of performance.*"

7. There is, moreover, an additional and peculiar reason why the statute of Missouri was not permitted to invalidate the contract of these parties, viz., because upon questions of general commercial law the United States courts disregard local statutes and decisions which are contrary to the principles thereof.

As to statutes: Watson *vs.* Tarpley, 18 How., 517.
As to decisions: Swift *vs.* Tyson, 16 Pet., 1.
Mich. Cent. R'y *vs.* Myrick, 107 U. S., 102.

In Watson *vs.* Tarpley, *supra*, this Court held that a statute of Mississippi providing that "no action or suit shall be "sustained or commenced on any bill of exchange until "after the maturity thereof" was contrary to the general commercial law, and therefore would be disregarded by the courts of the United States *sitting in Mississippi*.

If the United States court sitting in Mississippi may disregard a statute of Mississippi upon a question of general commercial law, may not the same court sitting in Illinois disregard a statute of Missouri not only contrary to the general commercial law, but also contrary to the law of Illinois, when it is introduced to enable a citizen of Illinois to avoid an obligation which he assumed in Missouri to perform in Illinois?

8. Another reason why the learned trial judge was right in ignoring the statutes of Missouri referred to is because the question as to what evidence shall be produced to charge one on a contract is answered by the law of the forum.

In Don *vs.* Lippman, 5 Clark & Fin. 15, Lord Brougham says: "The question whether a parol agreement is to be "given up or can be enforced must be tried by the law of "the country in which the law is set in motion to enforce "the agreement."

Cited by Justice Story, Conf. of Laws, sec. 6355, 3d ed. Approved by Dr. Wharton, Conf. of Laws, sec. 768, 2d ed.

The language of the statute of Missouri is similar to the language of the fourth section of the statute of frauds. The latter says: "No action shall be brought whereby to charge." The language of the Missouri statute is: "No person within this State shall be charged." In Leroux *vs.* Brown, 12 C. B.,

801, it was held that the fourth section of the statute of frauds "does not render the contract absolutely void, but "only applies to the mode of procedure upon it." The same ruling will apply to the Missouri statute.

See also in this connection the discussion of this point in—

Pritchard *vs.* Norton, 106 U. S., 124.
Downer *vs.* Chesebrough, 36 Conn., 39.
Turnow *vs.* Hockstader, 7 Hun., 80.

At the risk of being tedious we will state two more reasons why the rulings of the circuit court on the Missouri statute were right:

First. Because the said statute of Missouri does not require *contracts to accept* bills of exchange to be in writing.

A reasonably careful reading of the sections compels this conclusion. Section 533 says: "No person within this State "shall be charged as *an acceptor* of a bill of exchange unless "*his acceptance* shall be in writing, signed by himself or his "lawful agent." Section 534 gives the effect of an acceptance written on separate paper. Section 535 says: "An un- "conditional promise in writing to accept a bill before it is "drawn shall be deemed an actual acceptance in favor of "every person to whom such written promise shall have "been shown and who, upon the faith thereof, shall have "received the bill for a valuable consideration."

In Light *vs.* Powers, 13 Kansas, 96, the court, speaking through Judge Brewer, considered this question with reference to the Kansas statute on this subject, which is identical with the Missouri statute. The court said: "This, it "will be perceived, is not an action on the drafts nor an "attempt to charge the defendants as acceptors by virtue "of a previous promise to accept. It seeks to make them "responsible for damages for breach of contract to accept. "The difference between the two is obvious and is well "pointed out in the case of Boyce *vs.* Edwards, 4 Peters, "111. * * * It follows, therefore, that a petition stating

"such a contract and the breach of it states a cause of "action, and a demurrer to it should be overruled. *There* "*is nothing in the statute nor in the law merchant that requires* "*such a contract to be in writing.*"

Second. Because the Missouri statute in terms confines its operation "within the State" of Missouri.

In New York & Va. State Bank *vs.* Gibson, 5 Duer, at p. 583, the Court said, speaking of sections of the statutes of New York which are identical with those under consideration: "These provisions manifestly embrace all bills, "wherever drawn, that are to be accepted and paid within "this State; and were the terms of the statute less explicit "than they are, the general rule of law would lead us to the "same conclusion, that *the validity of a promise to accept a bill* "*of exchange depends upon the law of the place where the bill is* "*to be accepted and paid.*"

A brief reference is proper to the four cases cited in the brief of plaintiffs in error, on page 17, par. 6, to sustain the proposition: "The laws of the State of Missouri, where the pretended contract was made, govern its construction and validity." In the first two of said cases (Bond *vs.* Bragg and Stacy *vs.* Baker) the contracts were to be performed where they were made, and the Court properly held that the *lex loci contractus* governed. No question as to the *lex loci solutionis* was possible. In the third of said cases (Adams *vs.* Robertson, 37 Ill., 45) the Court said: "The laws of every "country allow parties to enter into obligations with refer- "ence to the laws of the country where such obligations are "to be performed, and although such obligations may not "be in accordance with the laws of the country where they "are made as regards obligations to be performed in that "country, they may be strictly in accordance with such laws "as to obligations to be performed in other countries."

The last case cited (Evans *vs.* Anderson, 78 Ill., 558) says: "It is a principle adopted everywhere, that the nature, va-

"lidity, and interpretation of contracts must be governed "by the laws of the country where the contracts are made "*or are to be performed.*"

Thus the first two cases cited by plaintiff in error on this point have no bearing upon the question at issue, while the last two cases are in consonance with the rule contended for herein, which was followed by the circuit court and which is followed by the vast majority of courts, that the validity of a contract is to be determined by the law of the place of performance.

A somewhat full collection of the more recent cases holding this to be the law is made by Mr. Bigelow in his note to section 280 of Story's Conflict of Laws, 8th edition.

The case of Scudder *vs.* Union National Bank, 1 Otto, 406, is not opposed to the rule that the validity of a contract is to be determined by the *lex loci solutionis.* In that case Scudder promised in Illinois to accept a bill of exchange, already drawn, payable in Missouri, and endeavored to evade payment by pleading the Missouri statute, claiming that, as the bill was payable in Missouri, that law should govern. But the court said: "If this be so" (*i. e.*, if a parol acceptance is valid in Illinois) "no question of "jurisdiction or of conflict of laws arises. The contract to "accept was not only made in Illinois, but the bill was then "and there actually accepted in Illinois, as perfectly as if "Mr. Scudder had written an acceptance across its face and "signed thereto the name of his firm. *The contract to ac-*"*cept the bill was not to be performed in Missouri. It had al-*"*ready, by the promise, been performed in Illinois.* The con-"tract to pay was, indeed, to be performed in Missouri; but "that was a different contract from that of acceptance."

The difference between the facts of that case and this is radical. There the contract was to accept an existing bill, which was an acceptance; that contract was performed in Illinois, and was, of course, governed by its laws, being the *lex loci contractus, lex loci solutionis,* and *lex fori.* Here the

contract, made in Missouri, was to accept a bill to be drawn months after the promise, and the performance of that promise was to be the acceptance of the bill which was to be in Illinois, the law of Illinois being *lex loci solutionis* and *lex fori.*

In the Scudder case the court said: "Matters bearing "upon the execution, the interpretation, and the validity of "a contract are determined by the law of the place where "the contract is made." This statement was not necessary to the decision of the case, and, as pointed out by Dr. Wharton (sect. 401, 2nd ed., Conflict of Laws), is to be restricted to contracts which are to be performed where made, or else the term "place where the contract is made" must be taken in its alternative signification as either the place where the contract is celebrated or the place where it is to be performed. This use of the term "place of the contract" is not unusual.

Wharton, Conf. of Laws, 2nd ed., section 401.

II.

Counsel for plaintiffs in error contend that there is a variance between the allegations in the declaration and the proof. The record, however, does not disclose that counsel objected to any evidence offered below on this ground or called the attention of the trial court to it in any manner, and thus gave the plaintiffs below an opportunity to amend their declaration to conform to the proof. He cannot raise such an objection for the first time in this court.

N. O., etc., R'y *vs.* Lindsay, 4 Wall., 650.

But an examination of the alleged variance makes it evident that an amendment below would have been unnecessary. Stephen defines a variance as a disagreement *upon a material point* between the allegation and the evidence.

This disagreement between the allegation and the evidence must be of such a character as to have misled the defend-

ants at the trial, in order to be taken advantage of as a variance.

Nash *vs.* Towne, 5 Wall., 689.

An examination of the variances alleged by counsel for plaintiffs in error makes it apparent that they are not material, that the defendants below could not have been misled by them, and that the declaration was substantially proved, which is all the law requires.

The variance claimed as to the first count is this: That the declaration alleges an agreement that defendants below would honor drafts "*on account of said shipments of cattle "aforesaid*" (p. 3, printed Record). The evidence was that Hall Bros. & Co. would pay all drafts drawn by George Farlow in favor of plaintiff on Hall Bros. "*for the cost of live "stock * * * shipped*" to Hall Bros. & Co. (pp. 17 and 18, printed Record).

This is no variance. "For the cost of" is simply more definite than "on account of." Defendants below could not have been misled; they knew that the draft was to be for the cost of the cattle, because they had paid 35 or 40 drafts which in each instance was for the cost of the shipment. But the allegation that one made a draft "on account of a "shipment" to a factor, in the absence of a limitation on the amount of the draft, would naturally be taken to mean that the draft covered the cost of the shipment. At the worst, the expression was nothing more than indefinite, and, if counsel had any doubt as to its meaning, the court below would probably have entertained a motion to make the count more definite and certain.

But the language of the proof in this particular follows exactly the allegation in the "additional count" (p. 6, printed Record).

It is claimed that this "additional count" and the proof present another variance, in that the proof shows a contract made between Hall Bros. & Co. and Cordell & Dunnica,

while this count alleges *no* contract between them, but a contract between Farlow and Hall Bros. & Co. This objection is answered most easily by referring to the first paragraph of this count (pp. 6 and 7, printed Record). A tripartite contract is alleged. It is stated that Hall Bros. & Co. made a contract with Farlow whereby the latter was to draw in favor of Cordell & Dunnica, and that Hall Bros. & Co. would accept and pay the drafts, "which said agree-"ment was before and at the time of the transaction here-"inafter complained of *reported and communicated by said* "*parties to said plaintiffs* and by said plaintiffs believed and "relied upon." If Hall "reported and communicated" to Cordell & Dunnica that his firm would "accept and pay" drafts drawn by Farlow in favor of Cordell & Dunnica, he must have made a contract directly with Cordell & Dunnica, which became binding when they cashed the drafts on the faith of said agreement. The count does allege a contract between Hall Bros. & Co. and Cordell & Dunnica.

With due respect to the learned counsel for plaintiffs in error, we submit that these objections are frivolous.

III.

Error is alleged in the refusal of the court to give the instructions asked by defendants below, numbered from 1 to 8, inclusive. The first two of said requests relate to the application of the Missouri statute; these were not given in any form. This ruling of the trial judge has been considered, and, we think, shown to be justified.

Defendants' instructions numbered 3, 4, 5, 6, and 7 (p. 19, printed Record) were not given in the form asked, but the principles declared therein are substantially included in the general charge of the court. These instructions of defendants below are stereotyped rules for the guidance of the jury in weighing the evidence. They probably announce correct principles of law, but the charge of the judge to the jury covering these rules was eminently fair and full. He told them they

" must say where the preponderance of the proof lies " (par. 5, p. 21, printed Record); that " you are the judges under the " law of the credibility of these witnesses, and not only of " the credibility of the witnesses, but to say which of them " you will believe " (par. 6). " You are the judges. You " have heard the witnesses testify. You have seen them " here in court, and you are to say where the preponderance " of the proof is " (par. 7). He told them that the testimony must *establish* the agreement to pay the drafts (par. 10, p. 22).

These portions of the charge seem sufficiently liberal to defendants. It is possible to befog a jury with complicated and elaborate instructions as to how they shall use their senses and intellects. In the language of Mr. Justice Miller, in Walker *vs.* Johnson, 6 Otto, 424, at p. 429, " It is appar- " ent that the attention of the jury was directed by the court " to all the matters essential to their understanding the case, " and we do not admit that a court is bound to give to the " jury, at the instance of counsel, every philosophical remark " found in text books of the law, however wise or true they " may be in the abstract or however high the reputation of " the author."

As to defendants' eighth request (p. 20), a sufficient reason for its refusal is that there was no evidence to support it. The undisputed evidence as to Farlow's pecuniary condition was that " he had no unincumbered property, and that the " plaintiffs were not willing to advance money on Farlow's " drafts unless the defendants would agree to protect the " same " (p. 16, printed Record). And the testimony of defendant Hall is that he would not loan Farlow $2,000 on his and another man's note (p. 17, printed Record).

The plaintiffs in error further object to the 11th, 12th, 13th, and 14th paragraphs of the charge of the court (pp. 22, 23, printed Record) on the ground that there is no evidence that the defendants knew that the shipment of July 13th was " purchased by Farlow with money obtained from plaintiffs," etc.

As the jury adopted the other theory of the case and found that Hall Bros. & Co. made the agreement as alleged, this may not be important; but to vindicate the charge of the learned judge we beg to direct the attention of the court to the evidence on this point, on page 16 of the printed Record, to the effect that between April 1, 1886, and July 13, 1886, Farlow made 35 or 40 shipments to Hall Bros. & Co.; that in the case of each shipment Farlow drew his draft for the cost of the live stock so shipped on Hall Bros. & Co., payable to Cordell & Dunnica or order; that the latter received said draft and paid out the money mentioned in it on Farlow's checks drawn in favor of the parties from whom he had purchased the stock; that they sent the drafts to Chicago, and in every instance Hall Bros. & Co. had paid the drafts. *This evidence was not denied in any particular by the defendants below.* In view of this evidence, coupled with the fact that William Hall had personally ascertained the poor financial standing of Farlow and that the draft and shipment of cattle were received on the same day, it is not a violent presumption that Hall Bros. & Co. knew when this shipment was received that the draft cashed by Cordell & Dunnica purchased the cattle and was to be paid out of the proceeds of their sale. For more than three months they had received no shipment from Farlow, but it was accompanied by the draft in favor of Cordell & Dunnica for the money which had made the shipment possible. At least there was evidence on this point to go to the jury. The defendants did not deny at the trial that they knew this draft was outstanding and that all parties intended and expected it would be paid from the proceeds of the sale of the cattle.

IV.

The judgment in this case should be affirmed, even admitting that the validity of the contract found by the jury to have been made between these parties is to be determined

by the law of Missouri. There can be no doubt but that plaintiffs in error knew that defendants in error held a draft against the shipment of July 13th for the cost of it. The evidence already referred to in this argument compels this conclusion. It was so obvious that defendants below did not attempt to deny it. Had there been no contract in the beginning, these parties, by a course of dealing begun prior to April 1st, 1886, and covering 35 to 40 similar shipments between that date and the shipment in question, had established relations with each other which could not be terminated without notice. The irresistible conclusion from the evidence is that Cordell & Dunnica advanced the money on this draft in implicit faith that Hall Bros. & Co. would deal with them as they had been dealing; that this draft would be accepted as more than forty other similar drafts had been accepted under precisely the same circumstances, and that Hall Bros. & Co. knew this fact when they received the shipment. Hall Bros. & Co. could not, legally, equitably, or honorably, receive the shipment and refuse the draft. The shipment came to them *cum onere*. They might have refused the shipment; they might have terminated their contract or the relations established by the long course of dealing with Cordell & Dunnica; but having failed to do either of these things—demanded not less by the law than by common fairness—their appropriation of this shipment becomes a fraud upon Cordell & Dunnica, unless it shall be held to be a virtual acceptance of the draft.

This aspect of the case was recently considered by the supreme court of Illinois under facts similar in many respects to those in the case at bar. It was also a case in which Hall Bros. & Co. sought to evade the payment of a draft drawn against a shipment of live stock which they had received and sold. In that case, as in this, they denied that there was any contract to accept, and the court instructed the jury on the hypothesis that there was no contract, but that Hall Bros. & Co. had received the shipment knowing

a draft upon them for the cost of the cattle was outstanding. Commenting on this instruction, the court said, affirming the judgment of the appellate court:

"If the defendants took the consignment of the cattle "with the knowledge that a draft had been drawn against "the same by the consignors, they could not thereafter re- "tain the cattle or their proceeds and repudiate the draft."

Hall *et al. vs.* First Nat. Bank, 24 N. E. Rep., 546.

In another case, under similar facts, the supreme court of Georgia held, citing 1 Pars. Notes and Bills, 291:

"If the defendants received the cotton consigned to them "after notice from the consignor that he had drawn a draft "against it in favor of the plaintiff for the money advanced "by him to pay for it and then refused to accept the draft "and applied the proceeds of the cotton to the payment of "their own account for advances made to Fears, the drawer, "then the plaintiff had a *prima facie* case."

So, in Massachusetts, the supreme court said, citing Chitty on Bills, p. 281:

"Besides, as these drafts were drawn expressly on prop- "erty sent to the defendant, which he received and sold "and took the proceeds, it is difficult to see how in such "case he can rightfully refuse on any ground to accept and "pay the draft."

Barney *vs.* Newcomb, 9 Cush., 46, at p. 56.

Hall Bros. & Co. were estopped to refuse this draft not only by the receipt of the shipment drawn against, but by their conduct toward and course of dealing with Cordell & Dunnica.

"Where a person tacitly encourages an act to be done he "cannot afterwards exercise his legal right in opposition to "such consent, if his conduct or acts of encouragement "induced the other party to change his position so that he

"will be pecuniarily prejudiced by the assertion of such ad-
"versary claim."

Swain *vs.* Seamens, 9 Wall., 254, at p. 274.

The judgment below was right. It simply enforced those just rules of honest dealing which it is at once the duty and glory of the law to protect and promote. The plaintiffs in error did not act in good faith. When Hall went to Marshall, Missouri, to make his arrangements for shipments from that point Farlow was indebted to his firm. This fact was not told Cordell & Dunnica. During more than three months this debt grew; but no intimation of its existence was given Cordell & Dunnica. They continued to furnish the money to buy the cattle on Farlow's drafts, all of which were promptly paid by Hall Bros. & Co., whether or not the shipment realized the amount of the draft. Had Hall Bros. & Co. told Cordell & Dunnica of this debt, and that they expected to make it out of a shipment for which Cordell & Dunnica should furnish the money, the latter would naturally have stopped cashing the drafts; but in that event Hall Bros. & Co. would have lost their customer and commissions. Finally, when Farlow's concealed indebtedness had grown so that Hall Bros. & Co. were unwilling to carry it longer, they calmly appropriated enough to pay their debt out of the proceeds of a shipment paid for, as usual, by Cordell & Dunnica, and against which the latter held the customary draft for its cost.

The plaintiffs in error ask the court to stamp such business methods with the seal of its approval by reversing this judgment.

"It is a sound principle of morality," said Mr. Justice Hunt in Scudder *vs.* Bank, *supra*, "which is sustained by "well-considered decisions, that one who promises another, "either in writing or by parol, that he will accept a par-"ticular bill of exchange, and thereby induces him to ad-"vance his money upon such bill in reliance upon his prom-

"ise, shall be held to make good his promise. The party "advances his money upon an original promise, upon a "valuable consideration; and the promissor is, upon prin- "ciple, bound to carry out his undertaking. Whether it "shall be held to be an acceptance, or whether he shall be "subjected in damages for a breach of his promise to accept, "or whether he shall be held to be estopped from impeach- "ing his word, is a matter of form merely. The result in "either event is to compel the promissor to pay the amount "of the bill, with interest."

We respectfully submit that justice was administered between these parties in the court below, and administered according to the law.

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